or Partners of such riot or civil commotion), or insurrection, military or unsurped power, or from wind storm, [fol. 5] tornado, earthquake, volcanic eruption, or similar disturbance of nature.

c. Any loss resulting from any act or acts of any director of the Insured, other than one employed as a salaried official, or of any partner of the Insured.

d. Any loss resulting from any loan made by the Insured or by any of the Employees, whether authorized or unauthorized, unless such loan be made with intent on the part of such Employee to defraud the Insured.

e. Shortages in the teller's cash due to errors; and any such shortage not in excess of the normal shortage shall be assumed to be due to error.

f. Any loss of Property confided to the care of Insured, the nominal value and description of which have not been ascertained by the Insured before loss.

g. Any loss resulting from authorized or unauthorized transactions in Foreign Exchange arising out of fluctuations in such exchange.

h. Any loss of Property contained in customers' safe deposit boxes unless such loss be sustained through any dishonest act of an identifiable Employee under such circumstances as shall make the Insured legally liable therefor.

3. No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the person making the statement.

4. The Insured shall give to the Underwriter written notive of any loss hereunder as soon as possible after the Insured shall learn of such loss, and within ninety days after learning of such loss shall file with the Underwriter an itemized proof of claim duly sworn to.

5. The value of any securities for the loss of which claim shall be made hereunder shall be determined by the average market value of such securities on the day preceding the discovery of such loss. If such securities have no

quoted market value, their value shall be determined by agreement or by arbitration.

6. No action or proceeding shall be brought under this bond in regard to any loss, unless begun within twelve [fol. 6] months after the Insured shall learn of such loss, or, in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law.

7. In case of recovery, whether made by the Insured or the Underwriter, on account of any loss hereunder, from any source other than insurance or suretyship, the net amount of such recovery, less the actual costs and expenses of making same, shall be applied to reimburse the Insured in full for such loss, and the excess, if any, shall be paid to the Underwriter; and the Insured shall execute all necessary papers to secure to the Underwriter the rights herein provided for.

8. The occurrence of any loss or losses hereunder and corresponding subsequent payment of such loss or losses shall not reduce the amount of this bond as to any other loss or losses hereunder, whether occurring before or after the loss or losses so paid: Provided, However, that in no event shall the Underwriter be liable on account of any one loss or series of losses caused by the acts or omissions of any Employee or other person, or combination of Employees or other persons, or caused by the same casualty or event for a greater sum than that specified in line 5 hereof; and Provided Further, that upon every sum so paid as a loss hereunder the Insured shall pay to the Underwriter, upon demand, an additional premium computed pro rata from the date of the giving by the Insured to the Underwriter of notice of the loss so paid to the end of the current premium year.

9. If the Insured shall, in the application for this bond, state its intention to carry fidelity suretyship upon any of the Employees, and shall, in the computation of the premium for this bond, receive credit for such suretyship, then, in case a loss shall be sustained through the dishonest act of any Employee covered, or stated to be covered, by such fidelity suretyship, the Underwriter shall be liable hereunder only for that part of such loss which is in excess of

the amount of fidelity suretyship carried or stated to be carried on such Employee.

10. If the Insured shall hold, as indemnity against any loss covered hereunder, any valid and enforceable security, or insurance other than the fidelity suretyship, if any, for [fol. 7] which credit has been given in accordance with the preceding section, the Underwriter shall be liable hereunder only for such proportion of such loss as the amount of this bond bears to the aggregate amount of this bond and such other security and insurance.

11. This bond shall terminate—(a) thirty days after the receipt of the Insured of a written notice from the Underwriter of its desire to terminate this bond, or (b) upon the receipt by the Underwriter of a written request from the Insured to terminate this bond. This bond shall terminate as to any Employee (a) as soon as the Insured shall learn of any default hereunder committed by such Employee, or (b) fifteen days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate this bond as to such Employee.

Signed, sealed and dated the 14th day of November, 1923.

The Aetna Casualty & Surety Company, by H. S. Betchelder, Resident Vice-President."

Attest: H. Johnson, Resident Assistant Secretary. (Seal.)

The plaintiff says that by agreement of the plaintiff herein and the defendant herein, the bond, contract or writing was to be in force from November 14, 1923, to April 8th, 1924, and thereafter, by agreement of the said parties, the same was to be in force annually to the 8th day of April, of each succeeding year as long as the annual premiums were paid on said bond; that by agreement of the parties, plaintiff and defendant herein, it was agreed that the premium payments would be paid on said bond and same were paid before their respective maturities, up to the 8th day of April, 1926, and that said bond, contract and writing is in full force and effect, and that the same has been continuously in full force and effect from the date that the same was signed, executed and delivered from defendant to plaintiff, on the 14th day of November, 1923.

Plaintiff says that by the terms of said bond, contract and agreement, it undertook to and did indemnify and save harmless the plaintiff herein, to the amount of Twenty-five Thousand ($25,000) Dollars, from and against any loss sus-[fol. 8] tained by the plaintiff herein, subsequent to noon, of November 14, 1923, and while said bond, contract and agreement was in force, and such loss as was discovered by the plaintiff herein subsequent to noon of said date, November 14, 1923, and prior to the expiration of twelve months after the termination of said bond; that is to say, the said defendant undertook to indemnify and save plaintiff harmless during said time and on said occasions from any loss through the payment, whether received over the counter or through the clearing house or by mail, of forged or raised checks or (genuine) checks bearing forged endorsements or the establishment of any credit to any customer on the faith of such checks.

Plaintiff says that thereafter, to-wit, while said bond, contract and agreement was alive and in full force and effect, and said guaranty and indemnity existed, it did suffer loss, as hereinafter stated, through payment and through the clearing house and over the counter, of forged and raised checks, and genuine checks bearing forged endorsements as follows, to-wit:

That heretofore, prior to May 12, 1924, on said date and continuously since said date down to the present time, one of the customers and depositors of the plaintiff herein was the Petroleum Company, a corporation, with its office located in Lexington, Kentucky.

That on the 12th day of May, 1924, the said Petroleum Company issued its check No. 1272, payable to one, Floyd B. Fitch, for the sum of .90 cts.; that thereafter, one, H. D. Fulton, fraudulently altered and raised said check and thereby increased the amount provided to be paid thereon from .90 cents, to $176.90, and in addition thereto, forged the name of Floyd B. Fitch on the back of said check, and cashed said check at the LaFayette Hotel Company; that said check was thereafter paid to the LaFayette Hotel Company by the Bank of Commerce, Lexington, Ky., and same was thereafter paid by the plaintiff herein, on June 17, 1924, and plaintiff charged same to the account of said Petroleum Company.

That on June 21, 1924, the said Petroleum Company issued its check No. 1277, payable to Floyd B. Fitch, for the sum of $17.90; that thereafter, said H. D. Fulton fraudulently altered and raised said check and thereby increased the amount provided to be paid thereon, from $17.90, to $317.90, and in addition thereto, forged the name of F. B. Fitch on the back of said check, and cashed said check at the LaFayette Hotel Company, that said check was thereafter paid to the LaFayette Hotel Company by the Bank [fol. 9] of Commerce, Lexington Ky., and same was thereafter paid by the plaintiff, on June 24, 1924, and plaintiff charged same to account of said Petroleum Company.

That on June 15, 1924, the said Petroleum Company issued its check No. 1296, payable to Floyd Shellito, for the sum of $100.00, that thereafter, said H. D. Fulton forged the name of Floyd Shellito, on the back of said check, and cashed said check at the LaFayette Hotel Company, that said check was thereafter paid to the LaFayette Hotel Company by the Bank of Commerce, Lexington, Ky., and same was paid by plaintiff on August 5, 1924, and plaintiff charged same to account of Petroleum Company.

That on June 15, 1924, the Petroleum Company issued its check No. 1297, payable to Homer Thrawley, for $108.00, and that thereafter H. D. Fulton forged the name of H. Thrawley on the back of said check and cashed said check at the LaFayette Hotel Co. and said check was thereafter paid to the LaFayette Hotel Co. by the Bank of Commerce, and same was paid by plaintiff on June 28, 1924, and charged by plaintiff to account of Petroleum Company.

That on September 27, 1924, said Petroleum Company issued its check No. 1421, to Felix M. Miles for $482.80; that thereafter said H. D. Fulton forged the name of Felix M. Miles on back of said check, cashed said check at the LaFayette Hotel Co., and said check was thereafter paid to LaFayette Hotel Co. by the said Bank of Commerce and same was paid by plaintiff on October 4, 1924, and charged by plaintiff to account of Petroleum Company.

That on August 20, 1924, said Petroleum Company issued its check, No. 1445, payable to H. Thrawley, for $117.00; that thereafter said H. D. Fulton forged the name of H. Thrawley on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was thereafter paid to the LaFayette Hotel Co. by the Bank of Commerce,

and same was paid by plaintiff on August 22, 1924, and charged by plaintiff to account of Petroleum Company.

That on August 25, 1924, the said Petroleum Company issued its check, No. 1486, payable to Robert Day for $25.00; that thereafter H. D. Fulton fraudulently altered and raised said check and thereby increased the amount provided to be paid thereon from $25.00, to $125.00, and in addition [fol. 10] thereto, forged the name of Robert Day on the back of said check, and cashed said check at the LaFayette Hotel Co., that said check was thereafter paid to the La Fayette Hotel Co. by the Bank of Commerce, and same was thereafter paid by plaintiff, on August 27, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on August 25, 1924, the Petroleum Company issued its check No. 1501, payable to the order of Felix M. Miles, for the sum of $8.56; that thereafter, said H. D. Fulton fraudulently altered and raised said check and thereby increased the amount provided to be paid thereon, from $8.56, to $88.96, and in addition thereto, forged the name of Felix M. Miles on the back of said check, cashed said check at the La Fayette Hotel Co., that said check was thereafter paid to La Fayette Hotel Co. by the Bank of Commerce, and same was paid by the Plaintiff on August 28, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on August 29, 1924, the Petroleum Company issued its check No. 1515, to Floyd B. Fitch, for the sum of $1.88; that thereafter, said H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $1.88, to $81.88, and in addition thereto forged the name of Floyd B. Fitch on the back of said check, cashed said check at the La Fayette Hotel Company, that said check was thereafter paid to the La Fayette Hotel Co. by the Bank of Commerce, and same was paid by plaintiff on September 3, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on September 13, 1924, the Petroleum Company issued its check, No. 1563, payable to H. O. Randel, for $34.00; that thereafter H. D. Fulton forged the name of H. O. Randel on the back of said check, cashed said check at the La Fayette Hotel Co. and said check was thereafter paid to the La Fayette Hotel Co. by the Guaranty Bank & Trust

Co., and same was paid by plaintiff on September 18, 1924, and charged by plaintiff to account of said Petroleum Company.

That on October 15, 1924, the Petroleum Company issued its check No. 1655, payable to Floyd Shellito, for $100.00; that thereafter said H. D. Fulton forged the name of Floyd Shellito on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was thereafter paid to the La Fayette Hotel Co. by the Bank of Commerce, and same was paid by the plaintiff on October 24, 1924, and charged by plaintiff to account of Petroleum Company.

[fol. 11] That on October 15, 1924, the Petroleum Company issued its check No. 1656, payable to Homer Thrawley, for $117.00; that thereafter H. D. Fulton forged the name of Homer Thrawley on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was paid the La Fayette Hotel Co. by the Bank of Commerce; and said check was paid by plaintiff on October 22, 1924, and charged by it to the account of the Petroleum Company.

That on October 29, 1924, the Petroleum Company issued its check No. 1659, to John B. Miles, for the sum of $1.20; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $1.20, to $159.97, and in addition thereto forged the name of John B. Miles on the back of said check; and said check was paid by the plaintiff thereafter, to-wit, on November 7, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on October 29, 1924, the Petroleum Company issued its check, No. 1660, payable to Floyd B. Fitch, for $1.20; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $1.20, to $170.00, and in addition thereto forged the name of Floyd B. Fitch on the back of said check; and that thereafter the said check was paid by plaintiff on November 1, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on November 4, 1924, the Petroleum Company issued its check, No. 1662, payable to Whitley Isaacs, for $10.00; that thereafter H. D. Fulton forged the name of Whitley Isaacs on the back of said check, cashed said check at the Blue Bird Taxi Co., and said check was paid the Blue

Bird Taxi Co., by the Guaranty Bank and Trust Co., and said check was paid by plaintiff on February 14, 1925, and charged by plaintiff to the account of the Petroleum Company.

That on November 4, 1924, the Petroleum Company issued its check, No. 1664, payable to Floyd B. Fitch, for $200.00; that thereafter H. D. Fulton forged the name of Floyd B. Fitch on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was paid to the La Fayette Hotel Co. by the Bank of Commerce, and same was paid by plaintiff on November 6, 1924, and charged by plaintiff to the account of the Petroleum Company.

[fol. 12] That on November 3, 1924, the Petroleum Company issued its check, No. 1665, payable to L. F. Feely, for $250.00; that thereafter H. D. Fulton forged the name of L. F. Feeley on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was paid to the La Fayette Hotel Co. by the Bank of Commerce, and same was paid by the plaintiff on November 8, 1924, and charged to the account of the Petroleum Company.

That on November 12, 1924, the Petroleum Company issued its check, No. 1681, payable to Carl Burgess, for $45.00; that thereafter H. D. Fulton forged the name of Carl Burgess on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was paid to the La Fayette Hotel Co. by the Bank of Commerce; and same was paid by the plaintiff on November 15, 1924, and charged to the account of the Petroleum Company.

That on November 12, 1924, the Petroleum Company issued its check No. 1682, payable to Clifford Couch, for $45.00; that thereafter H. D. Fulton forged the name of Clifford Couch on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was paid to the La Fayette Hotel Co. by the Bank of Commerce; and the same was paid by the plaintiff on November 14, 1924, and charged to the account of the Petroleum Company.

That on November 15, 1924, the Petroleum Company issued its check, No. 1685, payable to John Hale, for $105.00; that thereafter H. D. Fulton forged the name of John Hale on the back of said check, cashed said check at the La Fayette Hotel Co., and said check was paid to the La Fayette Hotel Co. by the Bank of Commerce; and same was paid by the plaintiff on November 25, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on November 25, 1924, the Petroleum Company issued its check, No. 1705, payable to Floyd Shellito, for $1.25; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $1.25, to $111.25, and in addition thereto, forged the name of Floyd Shellito on the back of said check, and cashed said check at the La Fayette Hotel Co., and said check was thereafter paid to the La Fayette Hotel Co. by the Bank of Commerce, and same was paid by the plaintiff on December 4, 1924, and charged to the account of the Petroleum Company.

That on December 16, 1924, the Petroleum Company [fol. 13] issued its check No. 1746, payable to Floyd B. Fitch, for $34.02; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $34.02, to $134.02, and in addition thereto, forged the name of Floyd B. Fitch on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was afterwards paid to the LaFayette Hotel Co. by the Bank of Commerce, and same was paid by plaintiff on December 30, 1924, and charged by plaintiff to the account of the Petroleum Company.

That on December 16, 1924, the Petroleum Company issued its check No. 1747, payable to Hugh E. Williamson, for $39.37; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $39.37, to $139.37, and in addition thereto, forged the name of Hugh E. Williamson on the back of said check, cashed said check at the La Fayette Hotel Co. and said check was afterwards paid to the LaFayette Hotel Co. by the Bank of Commerce, and the same was paid by plaintiff on December 16, 1924, and charged by plaintiff to the account of Petroleum Company.

That on December 16, 1924, the Petroleum Company issued its check, No. 1748, payable to Floyd B. Fitch, for $15.75; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $15.75, to $115.75, and in addition thereto forged the name of Floyd B. Fitch on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was afterwards paid to the La-

Fayette Hotel Co. by the Bank of Commerce, and the same was paid by plaintiff on December 23, 1924, and charged by it to the account of the Petroleum Company.

That on April 15, 1925, the Petroleum Company issued its check No. 1845, payable to Sam Hackworth, for $7.50; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $7.50, to $77.50, and in addition thereto forged the name of Sam Hackworth on the back of said check, and the said check was paid by the plaintiff on May 22, 1925, and same was charged by the plaintiff to the account of the Petroleum Company.

That on April 15, 1925, the Petroleum Company issued its check, No. 1846, payable to The Model Oil Company, for $15.00; that thereafter H. D. Fulton fraudulently al- [fol. 14] tered and raised said check, thereby increasing the amount provided to be paid thereon, from $15.00, to $115.00, and in addition thereto forged the name of The Model Oil Company, by Henry Day, on the back of said check, and said check was paid by the plaintiff on May 26, 1925, and charged by it to the account of the Petroleum Company.

That on April 15, 1925, the Petroleum Company issued its check, No. 1847, payable to Homer Thrawley, for $114.92; that thereafter H. D. Fulton forged the name of Homer Thrawley on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce; and same was paid by the plaintiff on May 9, 1925, and charged by the plaintiff to the account of the Petroleum Company.

That on April 15, 1925, the Petroleum Company issued its check No. 1848, payable to Robert Day, for $6.00; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $6.00 to $146.00, and in addition thereto forged the name of Robert Day on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce; and same was paid by the plaintiff on April 22, 1925, and charged by it to the account of the Petroleum Company.

That on April 15, 1925, the Petroleum Company issued its check No. 1849, payable to Henry Day, for $30.00;

that thereafter H. D. Fulton forged the name of Henry Day on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce; and same was paid by the plaintiff on May 14, 1925, and charged to the account of the Petroleum Company.

That on April 15, 1925, the Petroleum Company issued its check, No. 1850, payable to Ova Day, for $6.00; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid theeron from $6.00, to $66.00, and in addition thereto forged the name of Ova Day on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co., by the Bank of Commerce; and same was paid by the plaintiff on May 20, 1925, and charged by plaintiff to the account of the Petroleum Company.

That on April 20, 1925, the Petroleum Company issued [fol. 15] its Check No. 1854, payable to Cash for $1.50; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $1.50, to $150.00, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce; and same was paid by the plaintiff on April 22, 1925, and charged by it to account of the Petroleum Company.

That on April 22, 1925, the Petroleum Company issued its check No. 1855, payable to G. Arthur Bush, for $3.00; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $3.00, to $225.00, and in addition thereto forged the name of G. Arthur Bush on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce; and same was paid by plaintiff on April 28, 1925, and charged by it to the account of the Petroleum Company.

That on April 24, 1925, the Petroleum Company issued its check No. 1856, payable to J. D. Ruse for $90.00; that thereafter H. D. Fulton forged the name of J. D. Ruse on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce, and same was

paid by the plaintiff on April 28, 1925, and charged by it to the account of the Petroleum Company.

That on May 15, 1925, the Petroleum Company issued its check No. 1904, payable to H. D. Fulton, for $12.50; that the said H. D. Fulton thereafter fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $12.50, to $112.50, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce, and same was paid by this plaintiff on May 18, 1925, and charged by it to the account of the Petroleum Company.

That on June 8, 1925, the Petroleum Company issued its check No. 1904, payable to H. D. Fulton, for $12.50; that thereafter the said H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon, from $12.50 to $72.50, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce, and same was paid by the plaintiff on Jun[illegible] 10, 1925, and charged by it to the account of the Petrole[illegible] Company.

[fol. 16] That on the 22nd [illegible]y of June, 1925, the Petroleum Company issued its check, No. 1915, payable to H. D. Fulton for $12.50; that thereafter said H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $12.50 to $212.50; said check was paid by the plaintiff on June 23, 1925, and charged by it to the account of the Petroleum Company.

That on July 28, 1925, the Petroleum Company issued its check No. 1916, payable to Frank Rice, for $112.00; that thereafter H. D. Fulton forged the name of Frank Rice on the back of said check, cashed said check at the LaFayette Hotel Co., and said check was paid to the LaFayette Hotel Co. by the Bank of Commerce, and same was paid by plaintiff on August 1, 1925, and charged by it to the account of the Petroleum Company.

That on June 23, 1925, the Petroleum Company issued its check, No. 1918, payable to Glen Smith for $14.00; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $14.00, to $314.00, and in addition thereto forged the name of Glen Smith on the back of

said check, cashed said check, which was paid by the plaintiff on July 11, 1925, and charged by it to the account of the Petroleum Company.

That on June 23, 1925, the Petroleum Company issued its check, No. 1919, payable to Homer Thrawley, for $179.00; that thereafter H. D. Fulton fraudulently altered and raised said check, thereby increasing the amount provided to be paid thereon from $179.00, to $379.00, and said check was paid by the plaintiff on July 8, 1925, and charged by it to the account of the Petroleum Company.

That all of said checks, together with their written endorsements on the back thereof, are filed herewith, referred to and made part hereof marked as Exhibits herein and numbered in red ink on the back thereof, from 1, to 39, consecutively.

The plaintiff says that the total amount of said checks, altered and raised, as hereinabove set out, is the sum of $5512.72.

Plaintiff says that after said checks were so charged by it to the account of the said Petroleum Company, to-wit, on the 25th day of September, 1925, the said Petroleum Company made written demand on this plaintiff that it would credit the said Company's account with said checks, a list of which was then furnished by the said Petroleum Company to this plaintiff, and same is the list hereinbefore set out, and that said Petroleum Company [fol. 17] made demand that said checks should be credited to its accounts at once; that the said demand of the Petroleum Company was in writing; and that thereupon, on October 2, 1925, as soon as possible after the plaintiff learned of said loss, the plaintiff says that by its letter of said date to the defendant, it advised and stated to the defendant that said checks, as hereinbefore set out, had been forged and raised and were not genuine, that it had charged the same to the Petroleum Company's account, and that the Petroleum Company had demanded that said checks should be credited to its account, all of which facts were made known to, and of which the defendant was advised by the said plaintiff in its letter of said date of October 2, 1925, which letter is in words and figures as follows, to-wit:

"October 2nd, 1925.

"The Ætna Casualty and Surety Company, Hartford, Conn.

GENTLEMEN: We have your "Bankers' Blanket Bond" No. F-132522, and under said bond, you are hereby notified that on September 25, 1925, the Petroleum Company of this City, made demand on the undersigned to credit its account with the checks, a list of which is hereto attached, which have heretofore been charged to its account. Said demand being made, because said checks or the endorsements on said list indicated, were forged and not genuine, and the charges heretofore made against the Petroleum Company's account is alleged to be incorrect. The total of these checks is $5,512.72.

While these checks have not yet been credited back to the account of the Petroleum Company, the demand has been made that we should so credit said checks, and we will have to do so, as the information supplied to us indicates unquestionably that the statements, set out in the letter of the Petroleum Company to us, are true and correct. A copy of their letter and a list of the checks for which they demand credit, is attached hereto as part hereof, for your information.

Please give this matter your earliest consideration, and oblige,

Very truly yours, Phœnix National Bank and Trust Company, by W. H. Courtney, President."

[fol. 18] Plaintiff says that defendant received said communication above set forth, and on or about November 25, 1925, in writing, refused to pay said claim and denied any liability thereon.

Plaintiff says that thereafter the Petroleum Company again insisted and demanded that its said account should be credited with the said sum of $5,512.72, in accordance with its said previous demand, on September 25, 1925, hereinbefore referred to, and that this plaintiff did on the 14th day of January, 1926, credit the account of the said Petroleum Company with the sum of $5,512.72, pursuant to its said written demand, bearing date September, 1925; that on said January 14, 1926, the plaintiff so advised the

defendant herein, by writing in words and figures as follows, to-wit:

"January 14, 1926.

"The Ætna Casualty and Surety Company, Hartford, Conn.

GENTLEMEN: We have this day credited the Petroleum Company's account with $5512.72, pursuant to its written demand on us, bearing date September 25, 1925, a copy of which, together with itemized list of checks attached thereto, we inclosed to you with our letter of date October 2, 1925.

The basis of this claim against us, and for which it demanded its account should be credited, was forged and raised checks by which its funds were withdrawn from our bank by one, H. D. Fulton, at the times and in the amounts set forth in the itemized claim heretofore sent you, and a copy of which is now inclosed herewith.

As we have stated above, we have this day credited the Petroleum Company's account with this $5512.72, re-imbursement for which is now demanded by us from you, under your Bankers Blanket Bond #F-132522, under which Bond you undertake to indemnify the Phœnix National Bank and Trust Company, of Lexington, Ky., for,—

"any loss for the payment, whether received over the counter or through the clearing house or by mail, of forged or raised checks or (genuine) checks bearing forged endorsements or the establishment of any credit to any customer on the faith of such checks."

[fol. 19] We herewith inclose you the said itemized Proof of Claim, duly sworn to. Please let us have your check for the sum of $5512.72, with interest from this date, and oblige,

Very truly yours, Phœnix National Bank and Trust Company, of Lexington, by W. H. Courtney, President."

That the Proof or Claim, duly sworn to and referred to in that letter, was inclosed with said letter, and a copy thereof is herewith filed, referred to and made part hereof, marked Exhibit "Proof of Claim"; that the said defendant received said letter, bearing date January 14, 1926, to-

gether with the Proof of Claim thereto attached, on the 19th of January, 1926; that notwithstanding the plaintiff did in said letter of January 14, 1926, demand of defendant the sum of $5,512.72, with interest from said date, and on said date did advise, represent, state and inform the defendant that plaintiff had paid said claims hereinbefore set out, in full to the Petroleum Company, by crediting its account with the said amount—that notwithstanding said facts, the defendant has failed and refused to pay same, and still fails and refuses to pay plaintiff the said amount, or any part thereof.

Wherefore the plaintiff prays judgment against the defendant for the sum of Five Thousand Five Hundred and Twelve Dollars and seventy-two cents ($5,512.72), with interest from January 14, 1926, for its costs herein expended and for all proper relief.

B. D. Berry, Attorney for Plaintiff.

Duly sworn to by W. H. Courtney. Jurat omitted in printing.

[fol. 20] Endorsement: Petition and copy and one (1) exhibit filed, summons and Copy to Franklin County and Summons and copy to Fayette County issued. February 3rd, 1926. Att.: J. H. Carter, C. F. C. C.

EXHIBIT TO PETITION

STATE OF KENTUCKY,
County of Fayette:

W. H. Courtney says that he is President of the Phœnix National Bank and Trust Company, of Lexington, Kentucky; that said bank is the owner of the claim hereto attached against the Ætna Casualty and Surety Company, amounting to the sum of Fifty-five Hundred and Twelve Dollars and seventy-two cents ($5,512.72), with interest from this date.

That the basis of and consideration for said claim, is certain forged checks and raised checks, the forging and raising of which was executed by H. D. Fulton, on account of the Petroleum Company, one of the depositors of the

said Phœnix National Bank and Trust Company; that the total list of said checks is as follows:

List of Checks of the Petroleum Company altered or containing forged endorsements, or both, paid and charged to it by the Phœnix National Bank and Trust Company

(Note.)—"r" indicates check raised; "f" indicates forged endorsement.

Number	Payee	Amount			Benefit to company
1272	Floyd B. Fitch	$176.90	r.	f.	
1277	F. B. Fitch	317.90	r.	f.	
1296	Floyd Shellito	100.00		f.	
1297	Homer Thrawley	108.00		f.	
[fol. 21]					
1421	Felix M. Miles	482.80		f.	
1445	H. Thrawley	117.00		f.	
1486	Robert Day	125.00	r.	f.	
1501	Felix M. Miles	88.96	r.	f.	
1515	Floyd B. Fitch	81.88	r.	f.	
1563	H. O. Randel	34.00		f.	
1655	Floyd Shellito	100.00		f.	
1656	Homer Thrawley	117.00		f.	
1659	John B. Miles	159.97	r.	f.	
1660	Floyd B. Fitch	170.00	r.	f.	
1662	Whitley Isaacs	10.00		f.	
1664	Floyd B. Fitch	200.00		f.	
1665	L. F. Feely	250.00		f.	
1681	Carl Burgess	45.00		f.	
1682	Clifford Couch	45.00		f.	
1685	John Hale	105.00		f.	
1705	Floyd Shellito	111.25	r.	f.	
1746	Floyd B. Fitch	134.02	r.	f.	
1747	Hugh E. Williamson	139.37	r.	f.	
1748	Floyd B. Fitch	115.75	r.	f.	
1845	Sam Hackworth	77.50	r.	f.	
1846	The Model Oil Company	115.00	r.	f.	
1847	Homer Thrawley	114.92		f.	
1848	Robert Day	146.00	r.	f.	
1849	Henry Day	30.00		f.	
1850	Ova Day	66.00	r.	f.	

Number	Payee	Amount		Benefit to company
1854	Cash	150.00	r.	$1.50
1855	G. Arthur Bush	225.00	r. f.	.....
1856	J. D. Ruse	90.00	f.	.....
1882	H. D. Fulton	112.50	r.	12.50
1904	H. D. Fulton	72.50	r.	12.50
1915	H. D. Fulton	212.50	r.	12.50
1916	Frank Rice	112.50	f.	.....
1918	Glen Smith	314.00	r. f.	.....
1919	Homer Thrawley	379.00	r. f.	.....
	Total	$5,551.72		$39.50

[fol. 22] Schedule of checks paid by Phœnix National Bank and Trust Company, and improperly charged to account of the Petroleum Company by reason of the fact that either said check- were fraudulently altered and raised after being signed, or that they contain forged endorsements, or that they were both so altered and contain forged endorsements

Check No. 1272

Dated May 12-1924, payable to order of Floyd B. Fitch for $176.90. Endorsements—"Floyd B. Fitch" (pencil) forged—"H. D. Fulton" "La Fayette Hotel Co."—"Bank of Commerce, Lexington, Kentucky." Paid by bank June 17-1924.

In addition to containing the forged endorsement of the payee, said check was altered and raised from 90 cents to the amount indicated.

Check No. 1277

Dated June 21-1924, payable to order of Floyd B. Fitch for $317.90. Endorsements—"F. B. Fitch" (forged)—"H. D. Fulton" "La Fayette Hotel Co."—"Bank of Commerce, Lexington, Kentucky." Paid by bank June 24-1924.

In addition to containing the said forged endorsement, the check was fraudulently altered and raised from $17.90 to the amount indicated.

Check No. 1296

Dated June 15-1924, payable to order of Floyd Shellito for $100.00. Endorsements—"Floyd Shellito" (forged),

"H. D. Fulton" "La Fayette Hotel Co."—"Bank of Commerce, Lexington, Kentucky." Paid by bank August 5-1924.

Check No. 1297

Dated June 15-1924, payable to order of Homer Thrawley for $108.00. Endorsements "H. Thrawley" (pencil) forged—"H. D. Fulton" "La Fayette Hotel Co."—"Bank of Commerce, Lexington, Kentucky." Paid by bank June 28-1924.

[fol. 23] Check No. 1421

Dated September 27-1924, payable to order of Felix M. Miles for $482.80. Endorsements—"Felix M. Miles" (forged) "H. F. D." ("H. F. D.") Paid by bank October 4-1924.

Check No. 1445

Dated August 20-1924, payable to order of H. Thrawley for $117.00. Endorsements—"H. Thrawley" (forged)—"LaFayette Hotel Company"—"Bank of Commerce, Lexington, Ky." Paid by bank August 22-1924.

Check No. 1486

Dated August 25, 1924, payable to order of Robert Day for $125.00. Endorsements—"Robert Day" (pencil) forged—"H. D. Fulton" "LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank August 27-1924.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $25.00 to the amount indicated.

Check No. 1501

Dated August 25-1924, payable to order to Felix M. Miles for $88.96. Endorsements—"Felix M. Miles" (forged)—"H. D. Fulton," "LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank August 28-1924.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $8.56 to the amount indicated.

Check No. 1515

Dated August 29-1924, payable to order of Floyd B. Fitch for $81.88. Endorsements—"Floyd B. Fitch" (forged) "H. D. Fulton" "LaFayette Hotel Co."—"Bank of Commerce, Lexington, Kentucky." Paid by bank September 3-1924.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $1.88 to the amount indicated.

[fol. 24] Check No. 1563

Dated September 13-1924, payable to order of H. O. Randel for $34.00. Endorsements—"H. O. Randel" (forged) "H. D. Fulton" "LaFayette Hotel Company." Paid by bank September 18-1924.

Check No. 1655

Dated October 15-1924, payable to order of Floyd Shellito for $100.00. Endorsements—"Floyd Shellito" (forged) "LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank October 24-1924.

Check No. 1656

Dated October 15-1924, payable to order of Homer Thrawley for $117.00. Endorsements—"Homer Thrawley" (forged)—"H. D. Fulton" "LaFayette Hotel Co."—-Bank of Commerce, Lexington, Ky." Paid by bank October 22-1924.

Check No. 1659

Dated October 29-1924, payable to order of John B. Miles for $159.97. Endorsements—"John B. Miles" (forged).

In addition to containing the said endorsement, the check was fraudulently altered and raised from $1.20 to the amount indicated. Paid by bank November 7-1924.

Check No. 1660

Dated October 29-1924, payable to order of Floyd B. Fitch for $170.00. Endorsement—"Floyd B. Fitch" (forged). Paid by Bank November 1-1924.

In addition to containing the said endorsements, the check was fraudulently altered and raised from $1.20, to the amount indicated.

Check No. 1662

Dated November 4-1924, payable to the order of Whitley Isaacs for $10.00. Endorsements—"Whitley Isaacs" (pencil) (forged)—"Blue Bird Taxi Co., Everett Glass." "Guaranty Bank & Trust Co. Lexington, Ky." Paid by Bank February 14-1925.

[fol. 25] Check No. 1664

Dated November 4-1924, payable to order of Floyd B. Fitch for $200.00. Endorsements—"Floyd B. Fitch" (forged)—"LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank November 6-1924.

Check No. 1665

Dated November 3rd-1924, payable to order of L. F. Feely for $250.00. Endorsements—"L. F. Feely, (forged) —"H. D. Fulton"—"LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank November 8-1924.

Check No. 1681

Dated November 12, 1924, payable to order of Carl Burgess for $45.00. Endorsements—"Carl Burgess" (pencil) forged—"H. D. Fulton"—"LaFayette Hotel Co."—Bank of Commerce, Lexington, Kentucky." Paid by bank November 15-1924.

Check No. 1682

Dated November 12-1924, payable to order of Clifford Couch for $45.00. Endorsements—"Clifford Couch" (pencil) forged—"H. D. Fulton" "LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank November 14-1924.

Check No. 1685

Dated November 15-1924, payable to order of John Hale for $105.00. Endorsements—"John Hale" (pencil) forged

—"H. D. Fulton" "LaFayette Hotel Co."—"Bank of Commerce, Lexington, Ky." Paid by bank November 25-1924.

Check No. 1705

Dated November 25-1924, payable to order of Floyd Shellito for $111.25. Endorsements—"Floyd Shellito" (forged)—"H. D. Fulton" "LaFayette Hotel Co." -Bank of Commerce, Lexington, Ky." Paid by bank December 4 1924.

In addition to containing the said endorsements, the check was fraudulently altered and raised from $1.25, to the amount indicated.

[fol. 26] Check No. 1746

Dated December 16-1924, payable to order of Floyd B. Fitch for $134.02. Endorsements—"Floyd B. Fitch" (forged) "LaFayette Hotel Co." -Bank of Commerce, Lexington, Ky." Paid by bank December 30-1924.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $34.02 to the amount indicated.

Check No. 1747

Dated February 16-1924, payable to order of Hugh E. Williamson for $139.37. Endorsements—"Hugh E. Williamson" (pencil) forged—"LaFayette Hotel Co."—-Bank of Commerce, Lexington, Ky." Paid by bank December 16, 1924.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $39.37 to the amount indicated.

Check No. 1748

Dated December 16-1924, payable to order of Floyd B. Fitch for $115.75. Endorsements—"Floyd B. Fitch" (forged)—"H. D. Fulton" "LaFayette Hotel Co."—-Bank of Commerce, Lexington, Ky." Paid by bank December 23-1924.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $15.75 to the amount indicated.

Check No. 1845

Dated April 15-1925, payable to order of Sam Hackworth for $77.50. Endorsements—"Sam Hackworth- (pencil) forged—"H. D. Fulton." Paid by bank May 28, 1925.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $7.50 to the amount indicated.

Check No. 1846

Dated April 15th, 1925, payable to order of The Model Oil Company for $115.00. Endorsements—"The Model Oil Company By: Henry Day," (forged)—"H. D. Fulton." Paid by bank May 26-1925.

In addition to containing the said endorsement-, the check [fol. 27] was fraudulently altered and raised from $15.00, to the amount indicated.

Check No. 1847

Dated April 15-1925, payable to order of Homer Thrawley for $114.92. Endorsements—"Homer Thrawley" (pencil) forged, "LaFayette Hotel Co."—-Bank of Commerce, Lexington, Kentucky." Paid by bank May 9-1925.

Check No. 1848

Dated April 15-1925, payable to order of Robert Day for $146.00. Endorsements—"Robert Day" forged—"H. R. Fulton—LaFayette Hotel Company" -Bank of Commerce, Lexington, Ky." Paid by Bank April 22-1925.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $6.00, to the amount indicated.

Check No. 1849

Dated April 15-1925, payable to order of Henry Day for $30.00. Endorsements—"Henry Day" (forged), "H. D. Fulton" -LaFayette Hotel Co." "Bank of Commerce, Lexington, Ky.- Paid by bank May 14-1925.

Check No. 1850

Dated April 15-1925, payable to order of Ova Day for $66.00. Endorsements—"Ova Day" (pencil) forged, "H.

D. Fulton''—LaFayette Hotel Company'' -Bank of Commerce, Lexington, Ky.'' Paid by bank May 20-1925.

In addition to containing the said endorsements, the check was fraudulently altered and raised from $6.00 to the amount indicated.

Check No. 1854

Dated April 20-1925, payable to order of Cash for $150.00. Endorsement—''H. D. Fulton'' ''LaFayette Hotel Co.'' -Bank of Commerce, Lexington, Kentucky.'' Paid by bank April 22-1925.

Said check was fraudulently altered and raised from $1.50 to the amount indicated.

[fol. 28] Check No. 1855

Dated April 22-1925, payable to order of G. Arthur Bush for $225.00. Endorsements—''G. Arthur Bush'' (pencil) forged, ''H. D. Fulton'' ''LaFayette Hotel Co.'' -Bank of Commerce, Lexington, Ky.'' Paid by bank April 28-1925.

In addition to containing the said endorsement-, the check was fraudulently altered and raised from $3.00 to the amount indicated.

Check No. 1856

Dated April 24-1925, payable to order of J. D. Ruse for $90.00. Endorsements—''J. D. Ruse'' (pencil) forged, ''H. D. Fulton'' ''LaFayette Hotel Co.'' -Bank of Commerce, Lexington, Ky.'' Paid by bank April 28, 1925.

Check No. 1882

Dated May 15-1925, payable to order of H. D. Fulton for $112.50. Endorsements—''H. D. Fulton'' ''LaFayette Hotel Co.'' ''Bank of Commerce, Lexington, Ky.'' Paid by bank May 18-1925.

Said check was fraudulently altered and raised from $12.50 to the amount indicated.

Check No. 1904

Dated June 8-1925, payable to order of H. D. Fulton for $72.50. Endorsements ''H. D. Fulton'' ''LaFayette Hotel

Co." "Bank of Commerce, Lexington, Ky." Paid by bank June 10-1925.

Said check was fraudulently altered and raised from $12.50 to the amount indicated.

Check No. 1915

June 22-1925, payable to order of H. D. Fulton for $212.50. Endorsement—"H. D. Fulton." Paid by bank June 23-1925.

Said check was fraudulently altered and raised from $12.50 to the amount indicated.

Check No. 1916

Dated July 28-1925, payable to order of Frank Rice for $112.00. Endorsements—"Frank Rice" (forged), "H. D. Fulton" LaFayette Hotel Co." "Bank of Commerce, Lex-
[fol. 29] ington, Kentucky." Paid by bank August 1, 1925.

Check No. 1918

Dated June 23-1925, payable to order of Glen Smith for $314.00. Endorsements—"Glen Smith" (pencil) forged, "H. D. Fulton." Paid by bank July 11-1925.

In addition to containing the said endorsement, the check was fraudulently altered and raised from $14.00 to the amount indicated.

Check No. 1919

Dated June 23-1925, payable to order of Homer Thrawley for $379.00. Endorsements—"Homer Thrawley" (pencil) forged, "Wm. A. Waples, Agent By (H)." Paid by bank July 8-1925.

In addition to the said endorsement, the check was fraudulently altered and raised from $179.00 to the amount indicated.

That the demand of the Petroleum Company on the Phœnix National Bank and Trust Company to credit its account for said amount of $5,512.72, is in words and figures as follows, viz.:

Lexington, Kentucky,
September 25-1925.

Phœnix National Bank and Trust Company, Lexington, Kentucky.

GENTLEMEN: We have recently discovered that a number of checks drawn on our account in your bank have been fraudulently altered and raised or contain forged endorsements of the payee, or others, so that they should not have been honored by you, and were improperly charged to our account.

We hand you herewith a list of such checks, with memorandum of facts indicating the invalidity in each case.

The aggregate amount of said checks so charged to our account is $5,551.72. As indicated by the list, our Company benefited by the checks to the extent of only $39.00, that being the amount for which certain raised checks were orig-[fol. 30] inally written, so that the net amount improperly charged to our account is $5,512.72, and you are hereby called upon to credit our account with such amount, or otherwise refund it.

As we have heretofore advised you, these matters were not discovered by us until after the absconding of H. D. Fulton, who seems to be responsible for all such irregularities, and who was the keeper of the accounts and checks and other records of the Company, and was thus enabled to conceal the existence of such irregularities from the officers of the Company.

We tender herewith the original checks so referred to, and offer to make such reasonable proof of the irregularities as may be desired, and to afford full opportunity and access to the books and records of the Company, for full investigation of such matters.

Respectfully, The Petroleum Company, by Felix M. Miles, President."

That in accordance with said demand of the Petroleum Company the Phœnix National Bank and Trust Company has this day credited the account of the Petroleum Company with the sum of $5,512.72, the repayment of which amount is now demanded by said bank against the Ætna

Casualty and Surety Company, under its Bankers' Blanket Bond F-132522, which bond is now in full force and effect.

W. H. Courtney.

Subscribed and sworn to before me by W. H. Courtney this the 14th day of January, 1926. My commission expires 31 day of October, 1928. Margaret O. Stone, Notary Public, Fayette County, Ky.

[fol. 31] In Circuit Court of Fayette County

Summons to Franklin County and Return on Same

Summons Ordinary

The Commonwealth of Kentucky:

Fayette Circuit Court

To the Sheriff of Franklin County, Greetings:

You are hereby commanded to summon The Ætna Casualty and Surety Company, a Corporation, to answer a petition filed against it in the Fayette Circuit Court by Phœnix National Bank and Trust Company of Lexington, a Corporation, and warn it that upon its failure to answer for thirty days after service hereof the petition will be taken for confessed, or it will be proceeded against, for contempt, and you will make due return of this summons as provided by law.

Witness J. H. Carter, Clerk of said Court, this 3rd day of February, 1926.

J. H. Carter, C. F. C. C. B. D. Berry, P. Q.

Sheriff's Return on Summons to Franklin County

Executed on the within named Insurance Co. by delivering to S. M. Saufley Insurance Commissioner for the State of Kentucky a true copy hereof. This Feb. 4, 1926.

Ambrose McDonald, S. F. C., by L. D. Rich, D. S.

IN CIRCUIT COURT OF FAYETTE COUNTY

SUMMONS TO FAYETTE COUNTY AND RETURN ON SAME

Summons Ordinary

THE COMMONWEALTH OF KENTUCKY:

FAYETTE CIRCUIT COURT

To the Sheriff of Fayette County, Greetings:

You are hereby commanded to summon The Ætna Casualty & Surety Company, a Corporation, to answer a petition filed against it in the Fayette Circuit Court by Phœnix National Bank and Trust Company of Lexington, a Corporation, and warn it that upon its failure to answer [fol. 32] for twenty days after service hereof the petition will be taken for confessed, or it will be proceeded against, for contempt, and you will make due return of this summons as provided by law.

Witness J. H. Carter, Clerk of said Court, this 3rd day of February, 1926.

J. H. Carter, C. F. C. C. B. D. Berry, P. Q.

Sheriff's Return on Summons to Fayette County

Executed Feb. 3, 1926, by delivering to The Ætna Casualty & Surety Co. a corporation, Sam Walton a true copy of the within summons.

E. H. Fuller, S. F. C. W. R. Milward III, D. S.

[fol. 33] IN CIRCUIT COURT OF FAYETTE COUNTY

[Title omitted]

ORDER OF REMOVAL TO FEDERAL COURT—February 23, 1926

This day came the defendant, The Ætna Casualty and Surety Company, by counsel, and filed its petition for removal of this cause to the United States District Court for the Eastern District of Kentucky, held at Lexington in said District, and filed its bond conditioned upon (1) its entering in said District Court, within thirty (30) days

after this date a certified copy of the record in this suit, and (2) its paying all costs that may be awarded by the said District Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto; and said defendant also filed at the same time a written acceptance by the plaintiff, dated the 20th day of February, 1926, of service of notice of said petition and bond; whereupon it is ordered by this Court that the filing of said petition and bond and notice be, and it hereby is, noted of record, and that the said petition and bond be, and they hereby are, accepted, and this cause be, and it hereby is, removed to the District Court of the United States for the Eastern District of Kentucky, held at Lexington in said District.

[fol. 34] In Circuit Court of Fayette County

[Title omitted]

Notice—Filed February 23, 1926

To Phœnix National Bank and Trust Company of Lexington, the above-named plaintiff, and B. D. Berry, Its Attorney:

Notice is hereby given that on Tuseday the 23rd day of February, 1926, at or about the hour of 9:00 o'clock in the morning, the defendant in the above-entitled cause, The Ætna Casualty and Surety Company, will file in the above-named Court its petition and bond for the removal of the said cause from said court to the District Court of the United States in and for the Eastern District of Kentucky.

Wilson & Harbison, Counsel for Defendant.

The plaintiff in the above-styled action, Phœnix National Bank and Trust Company of Lexington, hereby accepts service of the foregoing notice, and acknowledges receipt of copies of the petition and bond therein mentioned, this 20th day of February, 1926.

Phœnix National Bank and Trust Company of Lexington, by B. D. Berry, Its Attorney.

[File endorsement omitted.]

[fol. 35] IN CIRCUIT COURT OF FAYETTE COUNTY

[Title omitted]

PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY—Filed February 23, 1926

Now comes The Ætna Casualty and Surety Company, the defendant in the above-entitled cause, and files this its petition for removal of this suit from this Honorable Court in which it is now pending to the District Court of the United States in and for the Eastern District of Kentucky, held at the City of Lexington in said District; and your petitioner respectfully shows:

That this cause was filed in this Court on the 3rd day of February, 1926, and that the time to plead, answer, or demur to the same has not expired under the laws of this State in such cases made and provided;

That this suit is brought by the plaintiff to recover of the defendant the sum of $5,512.72 alleged to be due under a bond, and is one of a civil nature, at law, of which the District Courts of the United States are given jurisdiction under the provisions of Section 24 of the Federal Judicial Code;

That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of $3,000.00;

That the defendant, The Ætna Casualty and Surety Company, in said suit was, at the time of the commencement of said suit, and continuously thereafter has been and now is, a non-resident of the State of Kentucky and was then, and still is, a corporation duly formed, created and existing under and by virtue of the laws of the State of Connecticut, and a citizen and resident of said State of Connecticut, having its principal place of business in the City of Hartford in the said state; and that the Phœnix National Bank and Trust Company of Lexington, the plaintiff in said suit, was at the time of the commencement thereof, and still is, a corporation duly organized and existing under [fol. 36] and by virtue of the national banking laws of the United States of America, and having its principal place

of business in the City of Lexington, in the State of Kentucky, and was then, and still is, a citizen and resident of the said State of Kentucky.

Your petitioner herewith files a good and sufficient bond under the statute in such case made and provided, conditioned as the law directs, and that it will within thirty (30) days from the filing of this petition for removal, file a certified copy of the record of this case in the District Court of the United States for the Eastern District of Kentucky, held at Lexington, in the said District, and for the payment of all costs which may be awarded by said Court if the said District Court shall determine that this suit was improperly or wrongfully removed thereto.

Your petitioner therefore prays this court that it proceed no further herein except to accept this petition and the said bond, and to order the removal prayed for, and to direct a transcript of the record in this action to be made and certified as provided by law.

Wilson & Harbison, Attorneys for said Defendant.

The affiant, Samuel B. Walton, being duly sworn, deposes and says that he is the chief agent in Fayette County, Kentucky, of the defendant, The Ætna Casualty and Surety Company and the same person upon whom the summons in this action was served, and that there is no officer of the said defendant in said county; and that the allegations of the foregoing petition for removal are true of his own, knowledge.

Sam. B. Walton.

Subscribed and sworn to before me by Samuel B. Walton this 23 day of February, 1926. J. H. Carter, C. F. C. C., by Katherine Laden, D. C.

[File endorsement omitted.]

[fol. 37] In Circuit Court of Fayette County

[Title omitted]

Bond for Removal—February 23, 1926

Know all men by these presents:

That we, The Ætna Casualty and Surety Company, as Principal, and Sam'l B. Walton, of Lexington, Ky., as Surety, are held and firmly bound unto the Phœnix Na-

tional Bank and Trust Company, of Lexington, Kentucky, the plaintiff in this cause, its successors and assigns, in the sum of Five Hundred Dollars ($500.00) for the payment of which well and truly to be made, we and each of us bind ourselves, our successors, heirs, executors and administrators, jointly and severally by these presents.

This obligation is upon condition, nevertheless, that whereas The Ætna Casualty and Surety Company has filed its petition in the Fayette Circuit Court of the State of Kentucky for the removal of the action therein pending wherein the Phœnix National Bank and Trust Company of Lexington, is plaintiff, and the said The Ætna Casualty and Surety Company is defendant, to the District Court of the United States for the Eastern District of Kentucky, sitting in the City of Lexington, in said District; now therefore, if the said The Ætna Casualty and Surety Company shall enter in the said District Court of the United States for the District aforesaid within thirty (30) days from the date of filing the said petition for removal, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, we the said Principal and Surety have hereunto caused our names to be subscribed this 23 day of February, 1926.

[fol. 38] The Ætna Casualty and Surety Co., by Clinton M. Harbison, Attorney-in-fact. Sam'l B. Walton. (Seal.)

Approved and accepted.

Richard C. Stoll, Judge.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] Judge's certificate to clerk omitted in printing.

Clerk's certificate to judge omitted in printing.

[fol. 40] In United States District Court, Eastern District of Kentucky

Order Filing Transcript—Filed March 16, 1926

This day came the defendant and offered for filing a transcript of the proceedings had herein in the Fayette Circuit Court, and the court being advised, it is now ordered that said transcript be and the same is filed and placed on the law docket of this court.

A. M. J. Cochran, Judge.

In United States District Court

Motion for Rule to Require Plaintiff to File Bond—Filed April 15, 1926

The defendant, The Ætna Casualty and Surety Company, moves the court for a rule to require the plaintiff to file herein, in conformity with the provisions of Section 120 of the Civil Code of Practice of Kentucky, the bond upon which this action is founded.

Wilson & Harbison, Counsel for Defendant.

See Section 120, Civil Code of Practice of Kentucky, and Preston vs. Roberts, 12 Bush (Ky.) 570, and Thompson vs. Sunrise Coal Company's Trustee, 181 Ky. 158, 204 S. W. 89.

[fol. 41] In United States District Court

General Demurrer to Petition—Filed April 15, 1926

Without waiving its motion for a rule to require the filing of the bond, the defendant, The Ætna Casualty and

Surety Company, demurs generally to the petition herein for the reason that the same does not state facts sufficient to constitute a cause of action against it.

Wilson & Harbison, Counsel for Defendant.

The petition does not show that the plaintiff sustained a loss: it does not show that the plaintiff was legally compellable to repay the depositor or to re-credit its account, but did so voluntarily. The depositor's negligence in the drawing and issuance of the cheques, and also its failure to discover or report the fraud for such a long time, prevented it from having a valid claim against the plaintiff bank:

Bank vs. Morgan, 117 U. S. 96; 29 Law Ed. 811;
First National Bank of Evansville vs. Fourth National Bank of Louisville, 56 Fed. 967;
Hennesy vs. Memphis National Bank, 129 Fed. 557;
Stallo vs. Wagner, 220 Fed. 360;
England National Bank vs. United States, 282 Fed. 121;
General Cigar Company vs. First National Bank of Portland, 290 Fed. 143;
Hackett vs. First National Bank, 114 Ky. 193; 70 S. W. 664.

[fol. 42] In United States District Court

Order Noting Filing of Motion and Demurrer—Filed Apr. 15, 1926

The defendant, The Ætna Casualty and Surety Company, files herein its motion, under Section 120 of the Civil Code of Practice of Kentucky, for a rule to require the plaintiff to file in this action the bond upon which the action is founded; and the said defendant, without waiving its said motion, files also its general demurrer to the petition herein; and it files also a brief statement of the grounds for the said motion and the said general demurrer.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

NOTICE—Filed May 11, 1926

To Messrs. Wilson & Harbison, attorneys for defendant:

Please take notice that on May 1, 1926, or prior thereto, I will apply to the Clerk of this Court to have the above cause noted for trial at the June Term thereof, 1926.

B. D. Berry, Attorney for Plaintiff.

The service of the above notice is hereby acknowledged, this 23rd day of April, 1926—without, however, any consent on the part of the undersigned or their client Ætna Casualty & Surety Co., to a trial, as the issues of this case are not yet joined.

Wilson & Harbison, Attorneys for Defendant.

[fol. 43] IN UNITED STATES DISTRICT COURT

ORDER ASSIGNING CAUSE—Filed May 11, 1926

This day came the plaintiff, and upon its motion, the court being advised, it is ordered that this cause be and the same is now set for the first day of the June Term, 1926, of this court, to-wit: June 14, 1926; on that day to be assigned by the court for trial on a day certain of said Term.

A. M. J. Cochran, Judge.

May 11, 1926.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEMURRER—Filed 6/22/26

The defendant's demurrer to the plaintiff's petition having been considered by the Court and the Court being sufficiently advised, it is ordered and adjudged that the said demurrer be overruled, to which the defendant excepts.

This order is to be entered.

B. D. Berry, Attorney for Plaintiff. Wilson & Harbison, Attorneys for Defendant.

Enter. A. M. J. Cochran, Judge.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER FILING AMENDED PETITION—Filed 6/23/26

Came this day the plaintiff herein and filed its Amended Petition herein.

This order is to be entered.

B. D. Berry, Attorney for Plaintiff. Wilson & Harbison, Attorneys for Defendant.

Enter. A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

AMENDED PETITION

The plaintiff, by leave of Court herein, comes and amends its petition, and says that each, all and every one of the checks, paid out by it as set out in its original petition herein, were checks that were issued by the said Petroleum Company on this plaintiff, and that said checks, and each of them, on presentment were paid by this plaintiff in the regular course of its business and in good faith, and without any notice that said cheeks, or any of them or any endorsement thereon, were forged or had been raised in amount.

Plaintiff further says that the said H. D. Fulton, named in its original petition, who fraudulently altered and raised said checks and committed forgery, in said petition set out, did so without any authority for so doing and without any knowledge on the part of this plaintiff that same had been done.

Wherefore the plaintiff prays as in its original petition, for costs and all proper relief.

B. D. Berry, Attorney for Plaintiff.

[fol. 45] *Duly sworn to by W. H. Courtney. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

AMENDED AND SUBSTITUTED ANSWER—Filed May 6, 1927

The defendant, The Ætna Casualty and Surety Company, comes now and files this its Amended Answer to the Petition and Amended Petition, praying that same be

taken in substitution for its original Answer herein, and states as follows:

The defendant denies that the plaintiff did suffer loss as stated in the Petition, or at all, through payment of cheques as stated in the Petition, or through payment of any cheque or cheques.

The defendant denies that said H. D. Fulton forged the name of Felix M. Miles on the back of Cheque #1421 of The Petroleum Company, described in the Petition and filed therewith as Exhibit #22; but this defendant states that the signature of said Felix M. Miles' name on the back of said cheque never purported to have been made by said Felix M. Miles himself, but that said signature was followed, underneath, by the signed initials, "H. D. F.", and purported all the while to have been made by said H. D. Fulton; and that said Felix M. Miles was at all times mentioned in the Petition, and is now, the President of the said The Petroleum Company, and known [fol. 46] by the plaintiff so to be, and the said H. D. Fulton was its bookkeeper, and known by the plaintiff so to be.

The defendant denies that check #1854 of The Petroleum Company, described in the Petition and filed therewith as Exhibit 39, was ever issued by said Petroleum Company in the sum of $1.50, or that thereafter H. D. Fulton or any other person ever altered or raised said cheque or increased the amount provided to be paid thereon; but this defendant states that said cheque was originally drawn and issued in the sum of $150.00,—the sum which the plaintiff paid thereon as set forth in the Petition; and this defendant states that said cheque was originally drawn and issued payable to "Cash" and marked "For J. Fred Miles"; and that said J. Fred Miles, who himself signed said cheque on behalf of the drawer, was at all times mentioned in the Petition, and is now, authorized to sign and issue cheques on behalf of said The Petroleum Company, and was, and was known by the plaintiff to be, the person who actively controlled and directed the operation of the said Company's business and affairs.

This defendant further states that John B. Miles, whose endorsement as payee was forged on cheque #1659 described in the Petition and filed as Exhibit #4 therewith, is the brother of said Felix M. Miles and J. Fred Miles, and was formerly Vice-President and Treasurer of said The Petroleum Company; and that Floyd B. Fitch, whose en-

dorsement as payee was forged on cheques #'s 1272, 1277, 1515, 1660, 1664, 1746 and 1748 described in the Petition and filed therewith as Exhibits #'s 1, 20, 3, 5, 30, 8 and 10, respectively, was at the times of issuance of said cheques and of their payment by the plaintiff Bank and return to said Petroleum Company the Secretary of said Company.

This defendant further states that the said The Petroleum Company's cheque-book stubs of cheques #'s 1644, 1665 and 1856 mentioned in the Petition and filed therewith as Exhibits #'s 30, 31 and 37, respectively, were plainly marked across their face "Void," when said cheques were issued, and that they continue to be so marked to this date; and that each of said three cheques was drawn and issued payable to a person to whom the said The Petroleum Company was not indebted at the time.

The defendant denies that the plaintiff either advised it or stated to it that the said cheques, or that any of same, had been forged or raised or were not genuine as soon as [fol. 47] possible after plaintiff learned of said alleged loss, or as soon as possible after the 25th day of September, 1925, or within a reasonably prompt time after the plaintiff learned of the claim of its said depositor, The Petroleum Company, on account of the said cheques; but the defendant states that the plaintiff wholly failed to give this defendant any notice whatever of any irregularity or fraud or loss in connection with any of said cheques until the 2nd day of October, 1925, when it wrote its letter of that date which is copied into the Petition.

This defendant denies that on or about November 25, 1925, or at any time, it denied all liability to the plaintiff upon or in connection with the aforesaid claim of the plaintiff's said depositor; but it states that it stated to the plaintiff, immediately upon receiving notice of said claim, that the plaintiff Bank itself was excused from all liability to its said depositor in respect of said cheques, on account of the negligence of said depositor, as hereinabove specified, and on account of said depositor's delay in giving the plaintiff notice of the frauds committed as recited in the Petition; and this defendant states that at the same time it demanded of the plaintiff as its obligee under the bond herein sued upon, that the plaintiff should not admit any liability, or make any payment, upon said claim until it should be judicially determined that the plaintiff was liable thereon; and

this defendant further states that it assured the plaintiff at that time that it, the defendant, would undertake the defense of any suit to be brought by said depositor upon said claim and bear all expense in connection therewith. And at the same time this defendant demanded of the plaintiff that it make immediate demand upon all prior endorsers of any of said cheques to take up the same by virtue of their endorsements, but that this the plaintiff refused to do.

The defendant further states that nevertheless in spite of this defendant's said demand that the plaintiff made no admission of liability upon the said claim of its said depositor, the plaintiff on or about the 14th of January, 1926, without the knowledge or consent of this defendant, entered a credit of the sum of $5512.72 back to the account of said depositor; but this defendant states that it has not knowledge or information sufficient to form a belief, and therefore it denies that the said credit to the said depositor's account was in whole or in part an absolute or unconditional credit, or that it amounted to a final repayment to said de-
[fol. 48] positor of any amount theretofore charged against it by the plaintiff on account of said cheques or any of them.

Paragraph II

For further answer to the Petition and Amended Petition herein the defendant, The Aetna Casualty and Surety Company, re-affirming and making part hereof all the allegations in Paragraph I of this Answer, states:

That from a time prior to the 12th day of May, 1924, the date on which the first of the cheques mentioned in the Petition was issued, until after the 28th day of July, 1925, when the last dated of said cheques was issued, the aforesaid H. D. Fulton was the trusted employee and clerk of the plaintiff's depositor aforesaid, The Petroleum Company; and that throughout said time said Fulton was charged by the said depositor with the duty of preparing its cheques for signature by its officers and sending or delivering said cheques to their several payees; and said Fulton during the whole of said time kept the books of account and financial records of the said depositor, and made all the entries in its said books of account, and made its bank deposits with the plaintiff Bank, and obtained from the plaintiff Bank the monthly statements of the bank account together with the cancelled cheques or vouchers. And

no officer of the said depositor made any examination of the said depositor's said books of account, cheque books, bank statements or cancelled vouchers with a view to ascertaining the correctness thereof; but the keeping of all said books and statements and records was negligently committed entirely to the said Fulton; and he alone prepared all the cheques of the said depositor for signature by its officers; and it was the negligent habit of the said officers to sign and to issue without question any cheque presented by said Fulton for signature, without ascertaining whether the amount of such cheque was due to the payee thereof or not.

That each of the cheques alleged in the Petition to have been altered and 'raised' was negligently drawn and issued by the plaintiff's depositor, the Petroleum Company, in such a way as to facilitate the alteration or 'raising' on its face of the sum of money ordered thereby to be paid; that blank spaces were negligently left by the drawer aforesaid on the face of each of said cheques in both the two places for the designation of the sum of money to be made payable, in such a way as to render it easy to write additional words [fol. 49] and figures in said spaces and thereby increase the sum of money made payable by the cheque, without giving it the appearance of having been altered.

That during each month throughout the time from the 12th of May, 1924, to the 1st of August, 1925, the plaintiff's said depositor, the Petroleum Company, was furnished by the plaintiff with the customary monthly statement of its bank account, showing in detail the deposits made and the cheques paid and charged to the said depositor's account, and the balances to the credit of said account at the beginning and the end of the month; and with each such monthly statement the cheques listed therein as having been paid by the plaintiff and charged to the said depositor's account were themselves returned, cancelled, to the said Petroleum Company; but that at no time during said period was any examination of any of said statements of account or cancelled cheques made by any officer of the said depositor, the Petroleum Company, or by anyone upon behalf of said depositor except the said H. D. Fulton himself.

And the defendant states that but for the above stated negligence of the said depositor, in its failure to supervise or check up or examine its books and records as kept by its said employee Fulton, and its failure to use ordinary

care in the drawing and issuing of its cheques in such a form as not to facilitate their being raised, and its failure to examine or inspect its monthly bank statements of account and returned cancelled cheques, the frauds complained of in the Petition would not have occurred, and the payments of the cheques mentioned in the Petition would not have been made by the plaintiff; and by reason of said negligence on the part of the plaintiff's said depositor, the plaintiff had a good defense against any claim of said depositor to compel repayment or recrediting of the amount paid by plaintiff on any or all of said cheques; and if the plaintiff did in fact pay the claim of said depositor in the sum of Fifty-Five Hundred Twelve Dollars and Seventy-Two Cents ($5512.72) as alleged in the Petition, or in any sum, or did in fact recredit the said depositor's account in the said sum or in any sum, on account of the plaintiff's payment of the said cheques or any of them, the plaintiff repaid or recredited the said account voluntarily and without being obligated or lawfully compellable so to do.

[fol. 50] Paragraph III

For further answer to the Petition and Amended Petition herein, the defendant, The Aetna Casualty and Surety Company, reaffirming and making part hereof all and singular the averments of the first and second paragraphs of this Answer, states further as follows:

Although the above-mentioned monthly bank statements, with the accompanying cancelled cheques, were returned by the plaintiff to its depositor, the Petroleum Company, each month during the period from the 1st of June, 1924, to and including the 1st of August, 1925, as set forth in the second paragraph of this Answer, the said depositor never objected or took any exception to any of the aforesaid monthly statements of its account with the plaintiff until after the payment by the plaintiff on the 1st day of August, 1925, of the last of the cheques mentioned in the Petition; and furthermore, the said depositor did not even then notify the plaintiff of any irregularity in respect of any of the said cheques or make any demand upon plaintiff for repayment of any amount charged against its account by the plaintiff on account of any of said cheques, until the 25th day of September, 1925. And meanwhile on or about the 1st day of August, 1925, the above named H. D. Fulton had left the

City of Lexington for parts unknown; and neither the plaintiff nor the defendant nor the said Petroleum Company has thereafter at any time been able to ascertain where he was, or to learn of any property or assets which might be subjected to any claim or judgment against him.

Thirty-one (31) of the cheques described in the Petition were paid by the plaintiff, as appears from the Petition, to other banks of the City of Lexington; and each of said thirty-one cheques prior to its payment by the plaintiff bore the endorsement of the bank which presented it to the plaintiff for payment; twenty-nine (29) of said thirty-one cheques bore the endorsement of the Bank of Commerce of Lexington, Kentucky, and the total sum of money paid by the plaintiff to the said Bank of Commerce upon said twenty-nine cheques was Thirty-Six Hundred Six Dollars and Ninety-five Cents ($3606.95); and the other two (2) of said thirty-one cheques bore the endorsement of the Guaranty Bank & Trust Company, of Lexington, Kentucky, and the total sum of money paid by the plaintiff to said Guaranty Bank & Trust Company on account of said two cheques was Forty-Four Dollars ($44.00); and thirty (30) of the said [fol. 51] thirty-one cheques bore also the prior endorsement of the Lafayette Hotel Company, of Lexington, Kentucky; and both the said two presenting banks and the said Lafayette Hotel Company are, and were at all times mentioned in the Petition, solvent corporations of the State of Kentucky, abundantly able to pay the amounts of all of said cheques. Yet the plaintiff has never made any demand upon any of said prior endorsers of any of said cheques upon their endorsements thereon; although this defendant immediately upon learning of the alleged frauds in the negotiations of said cheques demanded of the plaintiff that it make such a demand upon each of said prior endorsers on said cheques. And meantime the several accounts between the plaintiff bank and the two said prior endorser banks had regularly been stated and settled every banking day upon the basis that the said cheques were proper and bona fide cheques and properly and validly endorsed and paid.

Wherefore, the defendant prays that the plaintiff take nothing by its Petition, but that it be adjudged herein that the plaintiff sustained no loss within the contemplation of the bond herein sued upon; that the plaintiff's voluntary recrediting of its depositor's account before the

loss had been established or sustained, and over the objection of the defendant, the indemnitor in the bond, forfeited all right on the plaintiff's part to call upon the defendant for indemnity as for a loss sustained under the bond; and that even if the plaintiff had not thus forfeited all right in the premises, it could never have shown a loss sustained, because the account as between plaintiff and its depositor had long since been stated and settled under such circumstances of negligence on the part of the depositor as to disentitle it to any right of action to compel the opening up and falsifying and crediting of said accounts; and the defendant prays for all proper relief.

Wilson & Harbison, Counsel for Defendant.

[fol. 52] In United States District Court

General Demurrer—Filed May 6, 1927

The plaintiff comes and demurs generally to the defendant's Amended and Substituted answer herein, and especially to the second and third paragraphs thereof, because the facts stated in said second and third paragraphs, or in neither of them, are sufficient to constitute a defense to this action.

B. D. Berry, Attorney for Plaintiff.

In United States District Court

Motion to Strike Out—Filed May 6, 1927

The plaintiff comes and moves the Court to strike out that part of the Amended and Substituted Answer of defendant, filed herein, beginning with the word "and", on the third line from the bottom of the first page thereon, and ending with the word, "be", on the second line of the second page, the part to be stricken out being in words and figures as follows, viz:

"and that said Felix M. Miles was at all times mentioned in the Petition, and is now, the President of The Petroleum Company, and known by the plaintiff so to be, and

the said H. D. Fulton was its bookkeeper, and known by the plaintiff so to be."

The plaintiff comes and moves the Court to strike out of the Amended and Substituted Answer all that part beginning with the word, "but" on the 8th line of the second page, and ending with the word, "affairs" on the 19th line of the same page, the part to be stricken out being in words and figures, as follows, viz:

[fol. 53] "but this defendant states that said cheque was originally drawn and issued in the sum of $150.00—the sum which the plaintiff paid thereon as set forth in the Petition; and this defendant states that said cheque was originally drawn and issued payable to "Cash" and marked "For J. Fred Miles"; and that said J. Fred Miles, who himself signed said cheque on behalf of the drawer, was at all times mentioned in the petition, and is now, authorized to sign and issue cheques on behalf of said The Petroleum Company, and was, and was known by the plaintiff to be, the person who actively controlled and directed the operation of the said Company's business and affairs."

The plaintiff comes and moves the Court to strike out of the Amended and Substituted Answer all that part beginning with the word, "This" in line 20, of the second page, and ending with the word, "time" in line 8, of the third page; the part to be stricken out being in words and figures as follows, viz:

"This defendant further states that John B. Miles, whose endorsement as payee was forged on check #1659 described in the Petition and filed as Exhibit #4 therewith, is the brother of said Felix M. Miles and J. Fred Miles, and was formerly Vice-President and Treasurer of The Petroleum Company; and that Floyd B. Fitch, whose endorsement as payee was forged on cheques #'s 1272, 1277, 1515, 1660, 1664, 1746 and 1748 described in the Petition and filed therewith as Exhibits #'s 1, 20, 3, 5, 30, 8, and 10, respectively, was at the times of issuance of said cheques and of their payment by the plaintiff Bank and return to said Petroleum Company the Secretary of said Company."

"This defendant further states that the said The Petroleum Company's cheque-book stubs of cheques #'s 1664, 1665 and 1856 mentioned in the Petition and filed therewith as Exhibits #'s 30, 31 and 37, respectively, were plainly marked across their face "Void", when said cheques were issued, and that they continue to be so marked to this date; and that each of said three cheques was drawn and issued payable to a person to whom the said The Petroleum Company was not indebted at the time."

[fol. 54] The plaintiff comes and moves the Court to strike out of the Amended and Substituted Answer all that part, beginning with the word, "but" on the 16th line of page 3, and ending with the word, "Petition" on the same page in line 21; the part to be stricken out being in words and figures as follows, viz:

"but the defendant states that the plaintiff wholly failed to give this defendant any notice whatever of any irregularity or fraud or loss in connection with any of said cheques until the 2nd day of October, 1925, when it wrote its letter of that date which is copied into the Petition."

The plaintiff comes and moves the Court to strike out of the Amended and Substituted Answer of defendant, all that part beginning with the word, "but", in line 25, of the 3rd page, and ending with the word, "them", being the last word of the first paragraph, on page 3-2; the part to be stricken out being in words and figures as follows, viz:

"but it states that it stated to the plaintiff, immediately upon receiving notice of said claim, that the plaintiff Bank itself was excused from all liability to its said depositor in respect of said cheques, on account of the negligence of said depositor, as hereinabove specified, and on account of said depositor's delay in giving the plaintiff notice of the frauds committed as recited in the Petition; and this defendant states that at the same time it demanded of the plaintiff as its obligee under the bond herein sued upon, that the plaintiff should not admit any liability, or make any payment, upon said claim until it should be judicially determined that the plaintiff was liable thereon; and this defendant further states that it assured the plaintiff at that time that it, the defendant, would undertake the defense of any suit

to be brought by said depositor upon said claim and bear all expense in connection therewith. And at the same time this defendant demanded of the plaintiff that it make immediate demand upon all prior endorsers of any of said cheques to take up the same by virtue of their endorsements, but that this the plaintiff refused to do.

"The defendant further states that nevertheless in spite of this defendant's said demand that the plaintiff make no admission of liability upon the said claim of its said de-
[fol. 55] positor, the plaintiff on or about the 14th of January, 1926, without the knowledge or consent of this defendant, entered a credit of the sum of $5,512.72 back to the account of its said depositor; but this defendant states that it has not knowledge or information sufficient to form a belief, and therefore it denies that the said credit to the said depositor's account was in whole or in part an absolute or unconditional credit, or that it amounted to a final repayment to said depositor of any amount theretofore charged against it by the plaintiff on account of said cheques or any of them."

B. D. Berry, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER FILING ANSWER, ETC.—Filed May 6, 1927

Came this day the defendant herein and filed its Amended and Substituted Answer.

Came then the plaintiff and moved the Court to strike out of said Amended and Substituted Answer certain portions, indicated in the written motion.

Came then the plaintiff and demurred generally to the second and third paragraphs of said Amended and Substituted Answer, and this cause is now submitted on said motion to strike out, and on said general demurrer.

This order is to be entered.

——— ———, Judge. B. D. Berry, Attorney for Plaintiff. Wilson & Harbison, Attorneys for Defendant.

May 6, 1927.

[fol. 56] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT ON PLAINTIFF'S DEMURRER TO SECOND AND THIRD PARAGRAPHS OF DEFENDANT'S AMENDED AND SUBSTITUTED ANSWER AND UPON THE MOTION TO STRIKE THEREFROM—Filed June 8, 1927

This action is before me on plaintiff's demurrer to the second and third paragraphs of defendant's answer and motion to strike certain affirmative allegations from the first paragraph. Inasmuch as these affirmative allegations and the allegations of the second paragraph, which are all affirmative, are made parts of the third paragraph by reference, I will treat all the affirmative allegations of the entire answer together and determine whether any of them constitute a defense to the action to any extent.

The action is on an indemnity bond. The plaintiff is engaged in the banking business at Lexington in this district and the defendant is a surety company. On November 14, 1923 the defendant executed and delivered to plaintiff its bond whereby, in consideration of the payment of certain premiums, it undertook and agreed to indemnify plaintiff to an amount not exceeding $25,000 against any loss sustained by it subsequent to noon of that date and while the bond was in force and discovered by it subsequent to noon of that date and prior to the expiration of twelve months after the termination of the bond as therein provided, "through the payment, whether received over the counter or through the clearing house or by mail of forged or raised checks or (genuine) checks bearing forged indorsements or the establishment of any credit to any customer on the faith of such checks."

The petition alleges the payment of premiums which continued the bond in force from noon of its date until April 8, 1926. It alleges that prior to May 12, 1924, and continuously since that date, the Petroleum Company was and has been one of its depositors; that between that date and July 28, 1925 on different dates that Company drew thirty-nine checks against its account with plaintiff in favor of various persons for various sums; that, as to thirty-five of the checks, the indorsements of the payees thereof were forged by one H. D. Fulton, who also raised the sums to be paid on eighteen of them to larger sums; that, as to four

of them, he so raised the amounts to be paid on them; that in due course, it paid all of these checks, the sums paid on those raised being the sums to which they had been so raised; that on payment of those checks it charged the [fol. 57] sums paid, as paid, to the account of that company; that on September 25, 1925 that company made a written demand on plaintiff to credit its account with the sum of $5,512.72, the total amount of the sums paid on those checks which it should not have paid; that on October 2, 1925 plaintiff in writing notified defendant of this demand and in effect demanded payment thereof from it, which it refused, denying any liability therefor; and that on January 14, 1926 plaintiff credited the account of the Petroleum Company with that sum of $5,512.72 in recognition of its demand that this be done.

The defendant in its answer sets up affirmatively that H. D. Fulton, the forger, was a trusted employee of the Petroleum Company; that he prepared the checks drawn on plaintiff by the company for signature by its officers and after they were signed sent or delivered them to the payees; that he kept the books of account and all financial records of the company and made all entries therein; that he made all the deposits in plaintiff's bank and obtained from it monthly statements of its account with the company and the latter's cancelled checks and that he absconded August 1, 1925. It alleges that each of the checks which were raised was negligently drawn by the Petroleum Company in such a way as to facilitate the raising of the sum to be paid, in that blank spaces were left on the face of each in both places for the designation of the sum to be paid, which rendered it easy to write additional words and figures therein thereby increasing the sum to be paid, without giving the appearance of being altered; that each month from May 12, 1924 to August 1925 it delivered to Fulton for the Petroleum Company a statement of its account with plaintiff and its cancelled checks and it negligently failed to examine them and to discover the forgeries by Fulton sooner than it did and as soon as it could reasonably have done; that the Petroleum Company discovered the forgeries August 1, 1925, when Fulton absconded and that it negligently failed to notify plaintiff thereof until September 25, 1925; and that by reason of these several negligencies on the part of the Petroleum Company plaintiff was not bound

to make good to it the amount claimed by it or any portion thereof and the payment thereof by plaintiff in recognition of that claim was voluntary on its part. It further alleges that plaintiff negligently failed to promptly notify defendant of the forgeries; that as to thirty one of the checks, which had prior endorsements by two banks which paid [fol. 58] them, *plaintiff demanded of plaintiff banks which paid them,* defendant demanded of plaintiff that it notify the prior endorsers of the forgeries and demand payment from them and it failed to do so; and that upon its being notified of the forgeries it claimed to plaintiff that it, plaintiff, was not liable to account to the Petroleum Company for the amounts paid out by it, and demanded of it that it should not admit its liability or make payments on account thereof until it should be judicially determined that it was liable, and assured plaintiff that it would undertake the defense of any suit which might be brought by the Petroleum Company and bear all expense in connection therewith.

The defenses thus alleges and relied on may be thus stated:

1. That plaintiff was not liable to the Petroleum Company on account of the payments complained of because of its negligence in three particulars, in the drawing of the checks, in not discovering the forgeries as soon as it reasonably could and in not promptly notifying plaintiff thereof. Hence its accounting to that company was voluntary.

2. Even though plaintiff was liable to that company it is not entitled to recover of defendant because of its failure to give it prompt notice of the forgeries and because further of its settling with plaintiff without first having its liability judicially determined, thus affording defendant an opportunity to defend against the claim.

3. As to the checks bearing prior endorsements, even though defendant was liable to that company therefor, it is not entitled to recover of defendant because of its failure to promptly notify the prior endorsers of such forgeries and to demand payment thereof from them.

The plaintiff advances but a single consideration in support of its contention that none of what it thus put forward as a good defense to this action is really so to any extent.

It is this, that in paying these checks the plaintiff paid its own money and not the money of the Petroleum Company. It did not thereby in reality reduce its liability to that company a single penny. It remained liable to it for just as much as it did before. It therefore immediately upon such payment sustained the loss of the sums of money which it so paid. The bond indemnified it against such loss and hence it is entitled to recover thereon the sums so paid. It was not bound to look to the Petroleum Company or prior endorsers for reimbursement, but had a right to look direct [fol. 59] to the defendant on its bond. It cites in support of its position these decisions, to-wit:

Henderson Trust Co. vs. Ragan, 52 S. W. 848.

Champion Ice Co. vs. American B. & T. Co., 115 Ky. 863.

Commercial Bank vs. Arden & Fraley, 177 Ky. 520.

Beyond question the payments which it made were with its own money and not with that of the Petroleum Company. But from its point of view and that of the bond it did not thereby suffer any loss. The loss indemnified against by the bond was a loss "through payment" of such checks, i. e. the loss was a consequence of such payment. The payment was not itself a loss within the purview of the bond. The payments were on account of the Petroleum Company and plaintiff at once charged the payments to it and on its books reduced its liability to it to that extent. Its books did not show any loss. The reduction in liability to that company took the place of the cash paid out. And the plaintiff suffered no real loss unless subsequently thereto the Petroleum Company repudiated those charges. This it might or might not do. It was possible, at least, that after it became aware of the forgeries, out of consideration for the forger or for some other reason, it might conclude not to repudiate the charges and to pocket the loss itself rather than let the plaintiff bear it. In such case plaintiff would suffer no loss "through" or by reason of the payment of the checks. Further it might have no right to repudiate them. In such case it would no more suffer loss than it would where it did not in fact repudiate the payments but ratified them. This is one of the positions taken by the defendant by the allegations of its answer. It alleged that the Petroleum Company had no right to repudi-

ate the charges which plaintiff had made against its account of the sums paid on the forged checks and it was not liable to that Company for so much of its account as had been reduced by such payments because of its negligence in three particulars, to-wit; in the drawing of the checks, in not discovering the forgeries as soon as it reasonably could after the return of the monthly statements, and in not promptly notifying defendant of the forgeries after it had discovered them. Possibly there may be some question as to whether the Petroleum Company's right was affected by its negligence in the first of these particulars. The decisions in the cases of Henderson Trust Co. vs. Ragan and Commercial Bank vs. American B. & T. cited by plaintiff may support the position that it was not so effected. But there can be [fol. 60] no question but that its right was affected by its negligence in the second particular. This is settled by the decision of the Supreme Court in the case of Leather Mfg's. National Bank vs. Morgan, 117 U. S. 96, and other decisions cited by defendant.

Possibly the Petroleum Company's negligence in these two particulars only affected its right to repudiate the charges to the extent that they covered the sums over the sums for which the checks were drawn. This on the ground that there was nothing to indicate to the Company that the endorsements were forged. But this is not likely.

But certainly the Petroleum Company's right to repudiate and to recover was affected to the full extent by its negligence in the third particular. The plaintiff was entitled to prompt notice of the forgeries after their discovery if it intended to assert such right.

Generally as bearing on the defense of negligence on the part of the Petroleum Company, reference may be made to the note to 2 Michie on Banks & Banking, 1248, cited by defendant, where it is said:

"Where a bank is relieved from liability for cashing a forged check by the negligence of its depositor and then voluntarily makes good the depositor's loss, such bank cannot thereafter recover the amount of the check from another bank from which the check had been received in settlement of balances Van Wert National Bank vs. First National Bank. 60 C. Ct. 130, 30 C. D. 380."

Neither in such case can it recover the amount so voluntarily paid against a surety company which has agreed to indemnify it against loss through the payment of such a check. If then the allegations of the answer as to the negligences of the Petroleum Company are true the plaintiff suffered no loss by reason of the payments in question and is not entitled to recover from defendant.

The decisions cited and relied on by defendant have no other bearing on this question that as indicated above. So far at least, therefore, the answer presented a good defense. [fol. 61] But it must be held that the other defenses set up are also good. Though plaintiff may have been liable to make good the payments in question to the Petroleum Company it does not follow that plaintiff is entitled to shift its loss to the defendant under its bond. The plaintiff owed two duties to defendant. One was to promptly notify it of the Petroleum Company's claim as soon as it was informed of it and the other was to promptly notify the prior indorsers and demand payment of them. So far as the latter duty was concerned it was not to sue those indorsers, but simply to notify them and demand payment of them, so that they might know that reimbursement from them was expected and they might take such steps as they saw fit to protect themselves. It was plaintiff's duty to do this in order to preserve its right against them to which defendant was entitled to be subrogated if it paid the loss to defendant. The law is thus stated in 2 Michie on Banks & Banking, 1248:

"In determining the right and liabilities as between banks in the case of payments on forged paper, the usual rule applies that to shift the loss sustained upon forged commercial paper, the holder must give prompt notice of the forgery when discovered and return the check to the party upon whom the loss is sought to be cast."

So the usual rule should and does apply to shift the loss so sustained from a Bank to a Surety Company which has undertaken to indemnify it from such loss.

It is possible that plaintiff also owed to defendant the duty of not settling the Petroleum Company's claim until it had been judicially determined, after defendant notified

it not to do so and so settling it released defendant. But I do not find it necessary to determine this.

The demurrer and motion to strike is overruled.

June 7, 1927.

A. M. J. Cochran, Judge.

[fol. 62] In United States District Court

Order Filing Reply, etc.—Filed 6/13/27.

This day came the plaintiff and filed its reply herein, which is noted of record.

This cause coming on to be heard on plaintiff's demurrer to the second and third paragraph of defendant's amended and substituted answer, and on plaintiff's motion to strike out certain affirmative allegations from the first paragraph of said answer, and the Court being sufficiently advised, it is ordered and adjudged that said motions, and each of them, be overruled to which the plaintiff excepts.

In United States District Court

Reply—Filed 6/13/27

I. The plaintiff for reply to the defendant's Amended and Substituted Answer, filed herein, and especially to the first paragraph thereof, says that it is true that the said H. D. Fulton was the bookkeeper of the Petroleum Company, therein named, but it is also true that the said H. D. Fulton was a trusted officer of said Company, to wit, was Vice-President, Director and Treasurer, during all the times herein referred to, and all the times set out and set forth in the petition filed herein.

The plaintiff further denies and says it is not true that the plaintiff wholly failed or failed at all to give to defendant any notice of any irregularity or fraud or loss, in connection with any of said checks until the 22nd day of October, 1925, when it wrote its letter which is copied in plaintiff's petition; but on the contrary, plaintiff says that it wrote its letter, as set out in plaintiff's petition, complying with the requirements of the printed conditions on said

bond, and furnished the defendant the notice as thereon required; but in addition to this, plaintiff says it notified the defendant of the forgeries and irregularities claimed in plaintiff's petition herein, upon its receiving information [fol. 63] from the Petroleum Company of said facts; that it received notice from the Petroleum Company during the first ten days of August, 1925, and that it immediately thereupon notified the defendant of the fact of said forgeries and irregularities and gave to defendant a full, detailed statement of all the information it had at that time; that on or about the 10th day of August, 1925, the Auditors for the Petroleum Company began auditing the books, in order to detect and ascertain the extent of said forgeries and irregularities, and continued in said work for approximately three weeks, and that during the progress of said work, the defendant, through its agents and employes, was present and participated in said investigation.

Plaintiff says that immediately after its said notice to the defendant, said defendant, by its agents, made its own investigation of the facts in connection with said checks, and the forgeries and irregularities incident thereto, and expressed itself as satisfied and convinced that said irregularities and fraud and forgeries, with reference to said checks, existed, as represented to it by the said Petroleum Company, and by said agents indicated its entire satisfaction, that upon such state of facts, so ascertained by it and set out in plaintiff's petition herein, the plaintiff, bank, was liable to the Petroleum Company to reimburse it, the said Petroleum Company, for its said charges against its account, by reason of said forged and raised checks; and defendant further indicated, and expressed itself, that it would not question its liability under its said contract of indemnity to reimburse the said plaintiff in the amount of the said checks so forged and raised.

The plaintiff says it is not true and denies that defendant stated to plaintiff, immediately upon receiving notice of the plaintiff's said claim, or at all, that plaintiff was excused from all liability to said depositor, with respect to said checks, on account of the negligence of said depositor, or for any reason, or on account of said depositor having delayed in giving the plaintiff notice of the fraud committed, as recited in plaintiff's petition; and plaintiff says it is not true and denies that at the same

time, or at any time, the defendant demanded of plaintiff that plaintiff should not admit any liability or make any payment upon said claim until it should be judicially determined that the plaintiff was liable thereon; and plaintiff denies that the said defendant at any time demanded of plaintiff that it would make demand of all prior en-
[fol. 64] dorsers on said checks, or any of them, to take up said check, by virtue of their endorsements thereon, and denies this plaintiff refused to do so.

Wherefore the plaintiff having fully replied, prays as in its petition, for its costs herein, and all proper relief.

II. The plaintiff, for reply to the second paragraph of defendants' Amended and Substituted Answer, says that it is true from the 12th day of May, 1924, and prior thereto, until the 28th day of July, 1925, the said H. D. Fulton was a trusted employe of the plaintiff's depositor, Petroleum Company, but it is also true that during all of the said time, the said H. D. Fulton was a trusted officer in said Company, to-wit: he was Vice-President, Director and Treasurer, during all of said time, but plaintiff denies that the keeping of said books, statements and records was negligently committed to the said Fulton. It says that he had full authority to perform said services, so performed by him, by reason of his official connection with said Company, such authority having been given him on account of his ability and by reason of the long acquaintance with him of the other directors and officers of said Company, they having confidence in his integrity, which confidence they were justified in imposing in him, so far as they knew or any information they could obtain.

Plaintiff denies that it was the negligent habit of said officers to sign or to issue, without question, any check presented by said Fulton for signature, without ascertaining whether the amount of said check was due to the payee thereof or not, and it says that no check was issued by any officer of the said Petroleum Company, unless the correct amount of said check had previously been inserted therein, and further, unless said check was payable to the party to whom said check was due.

Plaintiff denies that each of said checks or any of said checks, set out in the petition, were negligently drawn or issued by the plaintiff's depositor, the Petroleum Company, in such way as to facilitate an alteration or "rais-

ing" on its face of the sum of money ordered thereby to be paid. Plaintiff denies that blank spaces were negligently left by the plaintiff on the face of each or any of said checks in either of the two places for the designation of the sum of money to be paid, in such way as to render it easy to write additional words or figures in said spaces, and thereby increasing the sum of money made payable by the check, without giving it the appearance of having [fol. 65] been altered; and plaintiff says that said blank spaces were filled in on the checks, and each of them, by indicating the name of the payee and the amount of the check, before the signature was attached thereto, although it was customary to have said checks, after they were signed and so completed as herein stated, to pass through a protectograph machine for the purpose of indicating in words the amount of such checks; and that in no manner and in no wise could said checks be tampered with or raised, except by one skilled in the undertaking and with criminal intent, which purpose plaintiff, at no time, anticipated.

Plaintiff says it has not sufficient knowledge or information to form a belief as to whether or not at any time during the period alleged by plaintiff in its answer, to-wit, between the 12th day of May, 1924, and the 1st day of August, 1925, there was no examination of any of said statements of account or cancelled checks made by any other officer of said Petroleum Company than H. D. Fulton himself, or by any other person on behalf of said depositor, except H. D. Fulton himself; and plaintiff denies that it has sufficient knowledge or information to form a belief that but for said alleged negligence of that said depositor in its alleged failure to supervise or check up or examine its books or records, as kept by the said Fulton, or by its alleged failure to use ordinary care in the drawing or issuing of its checks in such form as not to facilitate their being raised, or its alleged failure to examine or inspect its monthly bank statement of account and returned cancelled checks, the frauds complained of in the petition would not have occurred, and the payment of the checks mentioned in the petition would not have been made by plaintiff; and plaintiff denies by reason of said alleged negligence on the part of plaintiff's said depositor, the plaintiff had a good defense or any defense,

against any claim of said depositor to compel repayment or re-crediting of the amount paid by plaintiff on any or all of the said checks; and denies and says it is not true, that if the plaintiff did in fact pay the claim of said depositor in the sum of $5,512.72; as alleged in the petition, or did in fact re-credit said depositor's account in said sum, the plaintiff repaid or recredited said account voluntarily, without being obligated or lawfully compellable.

III. The plaintiff for reply to the third paragraph of defendant's Amended and Substituted Answer, says it is not true and denies that the depositor, to-wit, the Petroleum [fol. 66] Company, did not notify plaintiff of said irregularities or make any demand upon it for repayment of any amount charged against its account by plaintiff, on account of any of said forged or raised checks until the 25th day of September, 1925, but on the contrary plaintiffs says that the Petroleum Company did immediately upon discovering said irregularities, or at any rate within the first ten days of August, 1925, notify plaintiff of the facts in regard thereto, and as and when the said Petroleum Company completed an audit of its account, showing the full extent of said irregularities, it notified the plaintiff again on the 25th day of September, 1925, and during all of the time between the first notification and the last notification, kept plaintiff informed of the progress being made by it, in its investigation of the said Fulton accounts.

Plaintiff further says it is true it never made any demand upon said prior endorsers on said checks referred to in the plaintiff's petition and defendant's answer, upon their endorsements on said checks, but denies and says it is not true that the defendant immediately, or at all, upon learning of the alleged fraud in the negotiation of said checks, demanded of plaintiff that it make such demand upon each of the prior endorsers on said checks.

Plaintiff says at said time it represented and stated to defendant that its claim against defendant was by reason of the bond executed by it to plaintiff and for plaintiff's benefit, under and by the terms of which it undertook to indemnify plaintiff and hold it harmless from any loss not exceeding the amount set forth in said bond, among other things for any loss "through the payment whether re-

ceived over the counter or through the clearing house or by mail or forged or raised checks or (genuine) checks bearing forged endorsements, or the establishment of any credit to any customer on the faith of such checks", and that it, the said defendant, at said time made a thorough and complete investigation of the facts connected with the said irregularities, and by reason of the foregoing facts, this plaintiff represented to defendant and stated that plaintiff's claim should be paid by defendant and not by any prior endorsers on said checks.

Plaintiff stated and respresented to the defendant that if defendant would agree to pay plaintiff's claim herein sued on, that plaintiff would immediately thereupon, if defendant so desired it to do so, make prompt demand upon each and all of said endorsers on said checks for defend-
[fol. 67] ant, for payment of said checks by the said endorsers, by reason of the said endorsements thereon.

Wherefore the plaintiff having fully replied, prays as in its petition herein, for its costs, and for all proper relief.

B. D. Berry, Attorney for Plaintiff.

Duly sworn to by W. H. Courtney. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

ORDER FILING STIPULATION, ETC.—Filed Jan. 9, 1928

Came the parties hereunto by their attorneys and filed a Stipulation in writing, waiving a jury, and presenting an agreed statement of the facts upon which this cause should be tried—the filing of which is hereby noted.

It is thereupon ordered that this cause be, and it hereby is, submitted for trial by the Court without the intervention of a jury and upon said agreed statement of facts.

Baily D. Berry, Counsel for Plaintiff. Wilson & Harbison, by Clinton M. Harbison, Counsel for Defendant.

Jan. 9, 1928.

[fol. 68] IN UNITED STATES DISTRICT COURT

STIPULATION OF FACTS—Filed Jan. 9, 1928

It is hereby stipulated by and between the parties hereto that this cause may be submitted upon the following agreed statement of facts:

The plaintiff is and at all times herein mentioned has been a national bank engaged in the banking business at Lexington, Kentucky, and the defendant, a foreign corporation, engaged in the business of a surety company.

On 14th November, 1923, the defendant executed and delivered to the plaintiff the bond copied in the petition; and said bond continued in force until after the filing of this suit.

From a time prior to May 12, 1924, the Petroleum Company, a corporation with its principal office at Lexington, has been a depositor at the plaintiff bank; and from prior to May 12, 1924, till August 1, 1925, one H. D. Fulton was Vice-President and Treasurer of said Petroleum Company and was a member of its Board of Directors, and during the same time he was also its clerk in sole charge of its books of account, cheque-books, pass-books, bank-statements and the like, and was entrusted with the duty of preparing cheques to be drawn upon its account at the plaintiff bank; and the persons who had authority to sign said cheques for the Petroleum Company were Felix M. Miles, its President, and J. Fred Miles, his brother, who, however, was not an officer of the company.

Between the 12th of May, 1924, and the 1st of August, 1925, the plaintiff bank honored and paid the 39 cheques of the Petroleum Company which are filed with the Petition, and charged same, in the total sum of $5,551.72, to the Petroleum Company's account. The payee's endorsement on each of said 39 cheques was made by said H. D. Fulton fraudulently and without right: on 35 of the cheques it was a simple forgery of the endorsement, and on the remaining 4, (3 of which were payable to Fulton himself, and one to "cash"), he 'raised' the amounts, as hereinafter explained, before endorsing and cashing the cheques. Three (3) of the cheques (viz., numbers 1664, 1665 and 1856), were issued from cheque-book stubs marked "Void", and were made payable to persons to

whom the drawer was not indebted, and on 9 others (viz., numbers 1272, 1277, 1515, 1659, 1660, 1746, 1747, 1748 and 1855), Fulton fraudulently changed the name of the payee [fol. 69] and substituted names of other payees to whom the drawer was not indebted.

Twenty-two (22) of the 39 cheques were 'raised' by Fulton; that is, he altered and 'raised' the figure at the right of the cheque, and he inserted, with the protectograph, in the line for the writing out of the amount in words, a larger amount than that shown in figures at the right of the cheque when it was signed by the officer of the corporation.

The cheque-numbers, dates of issue, name of payees—or ultimate payees, where payees' names were changed—amounts, endorsements, and the dates of payment by plaintiff, of all said cheques are shown on said cheques themselves. And on the cheques which were 'raised', the amount for which the cheque was originally drawn is shown in pencil. A schedule of all said cheques, showing the above information in tabulated form, is as follows:

Schedule of the 39 Cheques

No.	Date 1924	Payee	Amt.	Raised amt.	Endorsements after payee's	Date pd. by pl. bank 1924
1272	12 May	Floyd B. Fitch	$ 90	$176 90	H. D. Fulton Lafayette Hotel. Bank of Commerce.	17 June
1277	21 June	F. B. Fitch	17 90	317 90	H. D. Fulton Lafayette Hotel. Bank of Commerce.	24 June
1296	15 June	Floyd Shellito	100 00	.....	H. D. Fulton Lafayette Hotel. Bank of Commerce.	5 Aug.
1297	15 June	Homer Thrawley	108 00	.....	H. D. Fulton Lafayette Hotel. Bank of Commerce.	28 June
1421	27 Sept.	Felix M. Miles	482 80	.....	"H. D. F."	4 Oct.
1445	20 Aug.	H. Thrawley	117 00	.....	Lafayette Hotel	22 Aug.
1486	25 Aug.	Robert Day	25 00	125 00	H. D. Fulton Lafayette Hotel. Bank of Commerce.	27 Aug.

1501	25 Aug.	Felix M. Miles	8.56	88.96	H. D. Fulton Lafayette Hotel. Bank of Commerce.	28 Aug.
1515	29 Aug.	Floyd B. Fitch	1.88	81.88	H. D. Fulton Lafayette Hotel. Bank of Commerce.	3 Sept.
1563	13 Sept.	H. O. Bandel	34.00	.....	H. D. Fulton Lafayette Hotel Co.	18 Sept.
1655	15 Oct.	Floyd Shellito	100.00	.....	Lafayette Hotel.	24 Oct.
1656	15 Oct.	Homer Thrawley	117.00	.....	H. D. Fulton Lafayette Hotel Bank of Commerce	22 Oct.
1659	29 Oct.	John B. Miles	1.20	159.97	.....	7 Nov.
1660	29 Oct.	Floyd B. Fitch	1.20	170.00	.....	1 Nov.
[fol. 70]						
1662	4 Nov.	Whitley Isaacs	10.00	.....	Blue Bird Taxi Co. Everett Glass Guaranty Bank & Trust Co.	1925 14 Feb.
1664	4 Nov.	Floyd B. Fitch	200.00	.....	Lafayette Hotel. Bank of Commerce	1924 6 Nov.
1665	3 Nov.	L. F. Feeley	250.00	.....	H. D. Fulton Lafayette Hotel. Bank of Commerce.	8 Nov.

No.	Date	Payee	Amt.	Raised amt.	Endorsements after payee's	Date pd. by pl. bank
1681	12 Nov.	Carl Burgess	45.00	.....	H. D. Fulton Lafayette Hotel. Bank of Commerce.	15 Nov.
1682	12 Nov.	Clifford Couch	45.00	.....	H. D. Fulton Lafayette Hotel. Bank of Commerce.	14 Nov.
1685	15 Nov.	John Hale	105.00	.....	H. D. Fulton Lafayette Hotel. Bank of Commerce.	25 Nov.
1705	25 Nov.	Floyd Shellito	1.25	111.25	H. D. Fulton Lafayette Hotel. Bank of Commerce.	4 Dec.
1746	16 Dec.	Floyd B. Fitch	34.02	134.02	Lafayette Hotel Bank of Commerce.	30 Dec.
1747	16 Dec.	Hugh E. Williamson	39.37	139.37	Lafayette Hotel Bank of Commerce.	16 Feb.
1748	16 Dec.	Floyd B. Fitch	15.75	115.75	H. D. Fulton Lafayette Hotel. Bank of Commerce.	23 Dec.
	1925					1925
1845	15 Apr.	Sam Hackworth	7.50	77.50	H. D. Fulton	22 May
1846	15 Apr.	The Model Oil Co	15.00	115.00	H. D. Fulton	26 May

1847	15 Apr.	Homer Thrawley	114.92	.....	Lafayette Hotel	9 May
					Bank of Commerce.	
1848	15 Apr.	Robert Day	6.00	146.00	H. D. Fulton	22 Apr.
					Lafayette Hotel.	
					Bank of Commerce.	
1849	15 Apr.	Henry Day	30.00	.....	H. D. Fulton	14 May
					Lafayette Hotel.	
					Bank of Commerce.	
1850	15 Apr.	Ova Day	6.00	66.00	H. D. Fulton	20 May
					Lafayette Hotel.	
					Bank of Commerce.	
1854	20 Apr.	Cash	1.50	150.00	H. D. Fulton	22 Apr.
					Lafayette Hotel.	
					Bank of Commerce.	
1855	22 Apr.	G. Arthur Bush	3.00	225.00	H. D. Fulton	28 Apr.
					Lafayette Hotel.	
					Bank of Commerce.	
	1925					1925
1856	24 Apr.	J. D. Ruse	90.00	.....	H. D. Fulton	28 Apr.
					Lafayette Hotel.	
					Bank of Commerce.	
1882	15 May	H. D. Fulton	12.50	112.50	Lafayette Hotel	18 May
					Bank of Commerce.	

No.	Date	Payee	Amt.	Raised amt.	Endorsements after payee's	Date pd. by pl. bank
1904	8 June	H. D. Fulton	12.50	72.50	Lafayette Hotel Bank of Commerce.	10 June
1915	22 June	H. D. Fulton	12.50	212.50		23 June
1916	28 July	Frank Rice	112.00		H. D. Fulton. Lafayette Hotel. Bank of Commerce.	1 Aug.
1918	23 June	Glen Smith	14.00	314.00	H. D. Fulton	11 July
1919	23 June	Homer Thrawley	179.00	379.00	Wm. A. Waples Agent By (H)"	8 July

[fol. 71] Said Fulton likewise committed similar frauds in connection with cheques of the Swiss Oil Corporation, an affiliated company for which he also worked.

Fulton left Lexington for parts unknown about the 1st of August, 1925; and none of the parties in interest here have since been able to locate him or any property of his.

About the 7th of August, 1925, Fulton's frauds were discovered, and the Petroleum Company shortly thereafter reported orally to the plaintiff that he had absconded and that forgeries by him of some of the 39 cheques in question had been discovered; and it notified the plaintiff that a complete investigation would be promptly made.

Thereafter during August and September said depositor procured an investigation and audit of Fulton's books, and during same a representative of the defendant was advised that said investigation was being made.

The first written notice of said frauds given by the Petroleum Company to the plaintiff was the letter of 25th September, 1925, which is copied into the exhibit marked "Proof of Claim" which is filed with the Petition; and in said letter said depositor called on the plaintiff to re-credit its account with the sum of $5,512.72 claimed to have been improperly charged against it on account of 39 cheques.

The first written notice of said frauds or of the depositor's claim based thereon given to defendant was plaintiff's letter of 2nd Oct., 1925, which is copied in the Petition.

Upon receipt of said letter of 2nd Oct., 1925, defendant made an investigation of the facts, and, through its State Adjuster at Louisville, Paul Kelley, and its local Adjuster at Lexington, H. Ratenburg, carried on communications with plaintiff relative to the responsibility for the loss on said cheques, and on the 25th of November, 1925, the defendant's Louisville agent, Paul Kelley, wrote to its Lexington agent, H. Ratenburg, the following letter, a carbon duplicate of which said Ratenburg thereupon showed to the plaintiff as stating the position then taken by the defendant.

[fol. 72] "Louisville, Ky., Nov. 25, 1925.

H. Ratenburg, Adj., Fayette Bank Bldg., Lexington, Ky.

DEAR SIR:

In re Claim F-11240, Phœnix National Bank & Trust Co.

We are instructed by the Home Office to deny liability of this loss, because it is not believed our Obligee Bank is liable to the two depositors. The delay in notification has been so great and so unreasonable that we believe that the depositors are estopped to recover the loss. At any rate, neither the obligee nor this Company could afford to admit liability or make payment until it had been judicially determined that the delay had not barred our obligee from recovering against prior endorsers. We authorize you to state to Obligee our position as herein expressed, but to give it our assurance that we will take the defense of any suit off its hands and bear all expenses in connection therewith. Of course if it is finally determined that our Obligee is liable, our bond is liable.

In the meantime, demand should be made immediately on the prior endorsers for the return of this money. This demand should have been made by our obligee as soon as it was notified of the loss, because just as the depositors may be estopped by their delay from recovering against obligee bank, in the same manner obligee bank may be estopped from recovering against the prior endorsers if it delays in notifying them of the forgery within a reasonable time after the discovery thereof.

If suit is brought by the two Oil Companies against our obligee bank, it may be that a Kentucky Statute would give the bank a right to bring in the prior endorsers as joint defendants, in order to prevent a circuity of action. It would be still better if the two Oil Companies would sue the drawee bank and all endorsers on the checks jointly, if such a proceeding could be had in Kentucky. This would iron out in one action the liability of the drawee bank to the depositors and the liability of the prior endorsers to the drawee bank.

We trust that the obligee will thoroughly understand our position and will agree with us that it would be foolish and [fol. 73] expensive generosity to admit liability to the Oil Companies, until it is established judicially that the delay

of the Oil Companies has not barred obligee's right, which it would have had otherwise, of recovering from the prior endorsers.

In making demand on the prior endorsers, the bank should merely notify them of the forgeries and ask that the money be returned in order that it may be credited to the account of the Oil Companies. At the same time, the bank should write a letter to the Oil Companies denying liability and stating that it is willing to make demand on the prior endorsers only as a matter of service and that it will credit to the account of the Oil Companies any money which the prior endorsers voluntarily return without suit, but that it will assume no personal responsibility for any part of the loss.

Very truly yours, (Signed) Paul Kelley."

PK-IS.

Thereafter on the 14th of January, 1926, the plaintiff made its formal demand of the defendant by its letter of that date which is copied in the Petition herein; and the defendant by its Louisville agent, Paul Kelley, thereupon wrote the plaintiff as follows:

"Feb. 4th, 1926.

Phœnix National Bank & Trust Co., Lexington, Ky.

GENTLEMEN:

Inc re F—11240, Phœnix National Bank & Trust Company, Lexington, Ky.

We are in receipt of a letter from our Hartford, Conn., Office to which is attached a copy of your letter of January 14th, addressed to the Ætna Casualty & Surety Company at Hartford. We regret that you have seen fit to credit the Petroleum Company's account with the amount of their claim. We have told you in the past and reiterate, that we shall raise no question of our liability for any loss you are legally compellable to pay on account of the forged checks involved in this transaction.

It has been our contention and we still contend, that we are not liable to the Petroleum Company, because, in the first place, we think checks were so negligently drawn that [fol. 74] the depositor could be estopped from recovering

against you. In the second place, most of these checks, for which claim is made, were drawn in 1924 and you were not notified of forgery until September 25, 1925. We were informed by you that the depositor was furnished with monthly statements. There is a duty on the depositor, to examine his returned checks and vouchers and to promptly notify the bank of any alterations in the body of the checks, as well as forgery of the drawee's signature. We believe if they do not do this, they may be estopped from recovering against the bank, especially when the bank has been prejudiced by delay. We regret that you have not seen fit to make demand on prior endorsers. This demand should have been made as soon as you were notified of loss, because delay in notifying prior endorsers of forgery within a reasonable time after discovery is made estops you from recovering against them.

We feel that you will thoroughly understand our position and agree with us that it would be foolish to admit liability to the Oil Companies, until it is established judicially, that the delay of the Oil Companies has not barred your rights of recovery from prior endorsers. We know you will understand, that if you were not legally liable to the depositors, you will need no reimbursement.

You will recall, that we assured you in the past, that we would take the defense of any suit brought by the depositors off your hands and bear all expenses in connection therewith.

Our request that you make demand on, or at least give notice of the forgery to all prior endorsers on checks, is a perfectly reasonable request and we do not know of any case where an Obligee has refused the request of such surety, to take the precaution so obviously necessary. You could not expect to recover under a fire insurance policy, if you stand by and let the building burn when you might easily have put out the fire. It seems to us that that same reasoning applies to this case.

Very truly yours, (Signed) Paul Kelley."

PK-IS.

And to said letter of February 4, the plaintiff replied on February 8 as follows:

[fol. 75] "Lexington, Ky., February 8th, 1926.

Mr. Paul Kelly, Adjuster of Ætna Casualty and Surety Co., Louisville, Ky.

DEAR SIR: We have your favor of the 4th, and while we have had no other communication from your Company in regard to this matter, other than a carbon copy of letter from you to Mr. H. Rattenburg, dated November 25, 1925, which carbon copy stated that you were instructed by the home office to deny liability on this loss, we took it for granted that was final, and your Company did not care to consider further negotiations. This is borne out by the statement in your letter of February 4th, in which you give the reasons for the position of your Company, and which is indeed a disappointment to us.

Your policy indemnifies us against any loss "through the payment whether received over the counter or through the clearing house or by mail of forged or raised checks, or checks bearing forged endorsements"; and yet, in your letter of the 4th, you take the position that we must establish or have established by a judgment of the Court our liability in this matter before you would make any payment. As that is your position, it is indeed unfortunate that that clause did not appear in the policy, when it was offered to us, because if it had been, most assuredly we would never have taken the policy.

We say we are disappointed at the reasons given for this position, because we take it for granted that you do know that the Court of Appeals of this state has stated in a case similar to this:

"The position of appellee was not only that of an insurer but in some sort that of a surety as well, and in both of these capacities its liability is primary and direct. It would be restricting the law of both insurance and suretyship to an absurd degree to say that appellee cannot be held liable until after appellant having exhausted every other remedy or prosecuted to insolvency any others who might be liable is still not reimbursed. In other words appellee's liability does not depend upon whether appellant might collect the stolen $500, from some one else."

We say, in face of these facts, the language of your bond [fol. 76] and the Court of Appeals decision on this question, we cannot understand your position in this matter.

Therefore, we have been compelled to institute suit in the Fayette Circuit Court, as our last resort.

Very respectfully, (Signed) W. H. Courtney, President.

WMC-MOS.

Throughout the communications carried on between the plaintiff and the Louisville and Lexington agents of the defendant as above stated, the defendant insisted that the plaintiff should not admit liability to its depositor the Petroleum Company without a judicial determination of the liability, and offered to take over the defense of any suit that might be brought in the premises by the Petroleum Company against the plaintiff, and furthermore insisted that the plaintiff make demand upon the prior endorsers of all of said 39 cheques which bore endorsements prior to their payment by the plaintiff. But the plaintiff on January 14, 1926, without the knowledge or consent of the defendant, recredited the account of its depositor, the Petroleum Company, with the sum of $5,512.72 without any judicial determination of its liability so to do: and the plaintiff has never to this day made any demand on any prior endorser of any of said 39 cheques.

Thirty-one (31) of the cheques in question were presented to the plaintiff for payment by other banks of the City of Lexington, and said cheques bore the endorsements of said presenting banks. The amount paid by the plaintiff upon said 31 cheques was $3,650.95. And said banks were at the time, and continued to be, abundantly solvent and able to pay the amounts of all of said cheques so endorsed by them.

Felix M. Miles, to whom certain of the cheques in question were drawn payable, and whose endorsement thereon was forged by said Fulton, was the President of the depositor, the Petroleum Company, and Floyd B. Fitch, to whom certain of said cheques were drawn payable, and whose endorsement was likewise forged upon them, was the Secretary of said depositor; and John B. Miles, whose endorsement was likewise forged on one of said cheques, was the brother of Felix M. Miles, and was a director of said company; and H. O. Randel, whose endorsement was likewise forged upon one of said cheques, was the brother-in-[fol. 77] law of J. Fred Miles, who directed the business of said Petroleum Company and had authority to sign cheques

upon behalf of said depositor and did sign 27 of those involved in this suit, as shown by said cheques. Of the other payees of the 39 cheques, all but two were or had recently been employees of the Petroleum Company, and had in the recent past been frequently paid by it, by its cheques, for their services; and all such cheques, endorsed by them and paid and cancelled, were on file at said Petroleum Company's office.

Said H. D. Fulton, the depositors' Vice-President and Treasurer and trusted clerk, was in sole charge of the company's books of account and its cheque-book and bank pass-book and bank monthly statements, and made all the Company's deposits at the plaintiff bank and received regularly from the plaintiff bank at the end of each month the bank's statement showing in detail all deposits made to the credit of the account, and all cheques paid and charged against the account, during the month, and the balances to the credit of the account at the beginning and at the end of the month; and with said statement he obtained also for the Petroleum Company the cancelled cheques themselves which had been paid and charged to the account during the month.

No other officer, agent, employee or member of the depositor company, nor anyone else upon its behalf, (other than Fulton), made entries in the corporation's books or took any supervision of, or made any investigation of, its bank account or of the monthly bank statements or returned cancelled cheques, during the whole period from 12th May, 1924, to 1st August, 1925.

In signing cheques prepared by Fulton for signature, the said J. Fred Miles and Felix M. Miles trusted and relied wholly upon said Fulton as to the accuracy of the cheques and the names of the payees, said Fulton being Vice-President, Treasurer, and a director of the depositor, and having the duties and authority hereinabove stated, which had been given him on account of his ability and of the long acquaintance of certain of the officers and directors with him.

All of said 39 cheques which were 'raised' were completed in writing by Fulton, except that the line for the application of the protectograph was left blank, and were signed, before the application of the protectograph to them. And Fulton was trusted to fill in the line stating the amount of the cheque, with the protectograph, and was charged

[fol. 78] with the duty of delivering the cheques, whether by mail or in person.

At no time between the 12th of May, 1924, and the 1st of August, 1925, did the Petroleum Company or anyone in its behalf give the plaintiff any notice of any irregularity in respect of any of the 39 cheques involved in this suit.

Settlements between the banks at Lexington were made through the clearing house daily, throughout the period herein involved.

The Bankers Blanket Bond upon which this suit is brought, and which is copied into the Petition, and the thirty-nine (39) cheques filed as exhibits with the Petition, and all other exhibits filed with or made part of this Petition, and the letters referred to in this Stipulation, are all made parts of this Stipulation.

And it is agreed that the Court may try this case without the intervention of a jury.

Baily D. Berry, Counsel for Plaintiff. Wilson & Harbison, by Clinton M. Harbison, Counsel for Defendant.

IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT—Filed 1/3/29

This action is before me for judgment. It is to be disposed of on the pleadings and a stipulation of facts. The facts, as stipulated, are substantially the same as alleged by defendant in its answer, to which plaintiff filed a motion to strike and a demurrer, both of which I overruled. On that occasion I handed down a written opinion. I find no reason for changing the views there expressed.

[fol. 79] The plaintiff stresses the decision in the case of Ocean Accident & Guarantee Corporation vs. Old National Bank, 4 Fed. (2nd) 753.

It maintains that it calls for a judgment in its favor. I do not think so. The policy sued on in that case was like the one involved here in that it provided for indemnity against loss. The particular loss provided for and involved was a loss by theft. Bills of lading attached to drafts were stolen from the Bank by an employee of the drawee. The Bank had paid the drawer the value of the bills stolen with-

out adjudication of liability and it was held that it was entitled to recover the amount so paid from the Surety Company on its bond. Liability to the drawer was incurred upon the stealing of the bills stolen but the loss was not incurred until the discharge of that liability by payment to the drawer of their value. Here it may be said that liability to recredit the account of the Petroleum Company accrued upon the plaintiff's charging it with the amounts paid on the checks. The loss called for by the bond would not be sustained until the account was recredited with the amount so charged or same was paid to the Company in cash. It did not occur on the payment of the checks, for the reason stated in the former opinion. Whatever may be said on the question as to whether or not the plaintiff theoretically or actually sustained a loss when the checks were paid it was not the loss which the policy had in view. It had in view the loss which should occur subsequent to the payment of the checks and the charging of them to the Petroleum Company by recrediting the amount paid to its account or paying same in cash. It is true that the plaintiff sustained a loss when it so recredited that Company's account. But such payment was voluntary on its part. That Company was not entitled to have the Bank account to it for the amount which it had so charged. The plaintiff's right of recovery depends on the question whether its accounting to its depositor for that amount was voluntary or not. If it was voluntary no recovery can be had. To hold otherwise would be to have allowed the plaintiff to refuse to account and recover the amount so paid and charged for the defendant and thereby enriching itself to the extent of $5,512.72. It is not now considered and held that if the so accounting had not been voluntary, i. e. if the Bank had been liable to so account to its depositor, it could [fol. 80] not properly so account with its first being adjudged in an action by the depositor against plaintiff that it was liable. In that contingency the defendant would have been liable to the plaintiff upon its so accounting without such an adjudication. The position is that the plaintiff was not then liable to its depositor to so account and this being so its so accounting was voluntary and therefore no recovery can be had.

The important question to be determined, therefore, is whether, at the time the plaintiff accounted to the Petro-

leum Company for the amount charged to its account because of its checks the plaintiff was bound to so account, or was it so doing voluntary. It would seem that the latter alternative is the true one. The payment of the checks covered a period of time extending from May 1924 to August, 1925. During that time at the beginning of each calendar month the plaintiff rendered to the Petroleum Company a statement of the amounts deposited and checks paid the preceding month and balance to its credit at the beginning and end of the month and delivered to the Company the checks which had been so paid and charged to its account. It made no objection to any of the monthly statements rendered by the Bank to it and gave no notice of any irregularity claimed in respect of the payment of any of the checks until September 25, 1925. By reason thereof the Petroleum Company became estopped to dispute the genuineness of the checks in the form in which they were paid.

Leather Mfgs. National Bank vs. Morgan, 117 U. S. 96
Empire Trust Company vs. Caban, 274 U. S. 473
Hennessey Bros. & Evans Co. vs. Memphis Nat. Bank, 129 Fed. 557.
Veneri vs. Draper, 22 Fed. (2nd) 33.

It can make no difference that the Petroleum Company's employee who was guilty of the wrong doing in relation to the checks received the monthly statements and cancelled checks and retained custody of them. The Company entrusted him with this duty and if it exercised no supervision over him, which it did not, it should bear the consequences.

As to the raised checks it would seem that the Petroleum Company was grossly negligent in executing them in a form which readily permitted them to be raised without exciting the suspicion of a careful man and for this additional reason the plaintiff was not bound to account to it [fol. 81] as to them and is not entitled to recover therefrom from defendant.

Brady on Laws of Checks, p. 156 says:

"It is a just rule to require the depositor to exercise reasonable care in the preparation of his checks to the end

that loss may not be thrown unnecessarily upon the Bank."

Particularly is the plaintiff not entitled to recover in view of the fact that before accounting to the Petroleum Company the defendant called its attention to the fact that it was not bound to so account and proposed to bear the expense of defending a suit by the Petroleum Company against Plaintiff. In the face of this notice and proposal, the plaintiff went ahead and accounted to that Company.

American Surety Co. of N. Y. vs. Ballman, 104 Fed. 634.

Thatcher vs. Ætna Co., 287 Fed. 484.

I do not find it necessary to consider and determine whether as to the checks paid by the two other banks, the plaintiff lost its right of action against defendant by the failure to give those Banks notice of their fraudulent character.

The defendant is entitled to a dismissal of plaintiff's petition at its costs.

A. M. J. Cochran, Judge.

Jany. 3, 1929.

[fol. 82] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed Jan. 12, 1929

This cause having by agreement of the parties been submitted to the Court for judgment upon the pleadings and upon an agreed statement of the facts, and counsel for the respective parties having filed written briefs herein; and the Court having considered the cause and having filed its written Opinion herein on the 3rd day of January, 1929; it is hereby ordered that said Opinion be, and it hereby is, made part of the record herein.

Whereupon, in conformity with said Opinion of the Court, it is hereby adjudged that the Plaintiff take nothing by its suit, and that the Defendant go hence without day; and it is hereby further adjudged that the Defendant recover of the Plaintiff its costs in this behalf incurred, to be taxed by the Clerk of this Court.

To all of the foregoing Judgment the Plaintiff excepts. This 12th day of January, 1929.

A. M. J. Cochran, Judge.

O. K.

Bailey D. Berry, James Park, Attys. for Plaintiff.
Wilson & Harbison, Clinton M. Harbison, Counsel for Defendant.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT—Filed Mar. 11, 1929

The above named plaintiff, the Phœnix National Bank and Trust Company of Lexington, conceiving itself ag-
[fol. 83] grieved by the Decree and Judgment made and entered herein on the 12th day of January, 1929, in the above entitled cause, does hereby appeal from said Decree and Judgment, and every part thereof, to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and prays that this appeal may be allowed, and that the Transcript of the Record, proceedings and papers, upon which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

James Park, B. D. Berry, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS ON APPEAL—Filed Mar. 11, 1929

Now comes the plaintiff, by its solicitors, and says that the decree and judgment in said cause is erroneous and against the just rights of the plaintiff, for the following reasons, viz:

(1) Because the Court erred in overruling plaintiff's motion to strike out of the first paragraph of defendant's amended and substituted answer that portion indicated by said written motion.

(2) Because the Court erred in overruling the plaintiff's general demurrer to the second and third paragraphs of the defendant's amended and substituted answer and to each of them.

(3) Because the Court erred in holding that the plaintiff was not entitled to the relief prayed for in its petition, and in adjudging that the plaintiff take nothing by its suit, and that the defendant go hence without day, at plaintiff's cost.

[fol. 84] (4) Because the Court erred in adjudging that under the pleadings and the agreed statement of facts, to-wit, the written stipulation, the plaintiff was not entitled to recovery, in accordance with the prayer of its petition.

Wherefore plaintiff prays that the judgment of the District Court of the United States for the Eastern District of Kentucky herein may be reversed, with directions to grant the relief prayed for in plaintiff's petition.

James Park, B. D. Berry, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL TO PLAINTIFF AND FIXING BOND—Filed Mar. 11, 1929

This day came the Phœnix National Bank and Trust Company of Lexington, by James Park and B. D. Berry, its Attorneys, and presented its Petition for Appeal and Assignment of Errors, and upon consideration thereof, it is now ordered and adjudged that said Petition and Assignment of Errors be, and the same are hereby filed, and that the Petition for Appeal be, and the same is hereby allowed to be reviewed in the United States Circuit Court of Appeals for the Sixth Circuit; and that a certified Transcript of the Record be transmitted to said United States Circuit Court of Appeals. Bond on said Appeal is hereby fixed at Two Hundred and Fifty ($250) Dollars.

This day came the plaintiff and offered for filing its Precipe herein, which is ordered filed and noted of record; also came the plaintiff and executed its bond on the appeal

herein in the sum of $250.00, which said bond is now hereby approved.

[fol. 85] A. M. J. Cochran, Judge District Court of United States for Eastern District of Kentucky.

O. K.

Clinton M. Harbison, of Counsel for Defendant.
James Park & B. D. Berry, Attys. for Plaintiff.

Bond on appeal for $250.00, approved and filed March 11, 1929, omitted in printing.

[fol. 86] IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed Mar. 11, 1929

To the Clerk:

You are requested to prepare a Transcript of Record, to be filed in the United States Circuit Court of Appeals, for the Sixth Circuit, pursuant to an appeal allowed in the above entitled cause, and to include in such Transcript the entire record herein, with the exception of the original answer of the defendant, and with the exception of the checks, filed herein as Exhibits. When said Transcript has been completed, you are requested to deliver same to [fol. 87] the Westerfield-Bonte Company, at 217-219 South Eighth St., Louisville, Kentucky, for printing.

This 11th day of March, 1929.

James Park, B. D. Berry, Attorneys for Plaintiff.

Service of a Copy of the above Præcipe is hereby acknowledged this 4th day of March, 1929, and it is agreed that the Original Answer of the defendant may be omitted from the Record herein, on appeal.

Wilson & Harbison, by Clinton M. Harbison, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER RE RECORD AND EXHIBITS—Filed Mar. 11, 1929

The Clerk is hereby ordered and directed, upon the transmission of a printed copy of this Record to the United

States Circuit Court of Appeals, to also transmit the thirty-nine (39) checks, filed as Exhibits with the petition in this action.

It is further ordered that the Clerk of this Court be, and he is, hereby directed to forward all of the papers, documents or Exhibits, comprising the Transcript of Record to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, except the said original checks, to the Westerfield-Bonte Company, at Louisville, Ky., for printing.

A. M. J. Cochran, Judge.

O. K.

Wilson & Harbison, by Clinton M. Harbison. James Park & B. D. Berry, Attys, for Plaintiff.

[fol. 88] Citation, in usual form, showing service on Clinton M. Harbison, filed March 25, 1929, omitted in printing.

[fol. 89] In United States District Court

Order Extending Time—Filed Apr. 8, 1929

By agreement of parties, plaintiff and defendant, it is ordered that the plaintiff, Phœnix National Bank and Trust Company of Lexington, be, and it is hereby given until and including May 15, 1929 within which to file the printed record herein in the office of the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

A. M. J. Cochran, Judge.

O. K.

B. D. Berry, James Park, Attorneys for Plaintiff.
Wilson & Harbison, by Clinton M. Harbison, Attorneys for Defendant.

8 Apr. 1929.

[fol. 90] In United States District Court

Stipulation in re Certification of Record

It is Hereby Stipulated and Agreed that the record, as presented to the Clerk by the printer, may be certified by

the Clerk as a true, full and complete copy, as agreed to by counsel, of the original pleadings, papers and orders, used on the trial of this cause as set forth in the præcipe for transcript, without further comparison by the Clerk, and

It is Stipulated and Agreed Hereby that the record, as presented to the Clerk by the printer, is a true, full and complete copy of the pleadings, papers and orders used on the trial of this case as set forth in the precipe.

B. D. Berry, James Park, Attorneys for Plaintiff.
——— ———, Attorneys for Defendant.

[fols. 91 & 92] Certificates of Clerk omitted in printing.

[fol. 93] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPEARANCE OF COUNSEL—Filed May 21, 1929

J. W. Menzies, clerk of said court:

Please enter *my* appearance as Counsel for the Appellant.

B. D. Berry, James Park, Lexington, Ky.

IN UNITED STATES CIRCUIT COURT OF APPEALS

CAUSE ARGUED AND SUBMITTED

February 3, 1930

Before Denison, Hickenlooper, and Anderson, JJ.

This cause is argued by B. D. Berry for Appellant and by C. M. Harbison for Appellee and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed November 12, 1930

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, it is now here ordered, and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and this cause remanded for entry of judgment for plaintiff in accordance with the opinion of this court.

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed November 12, 1930

Before Denison and Hickenlooper, Circuit Judges, and Anderson, District Judge

DENISON, Circuit Judge:

The appellant bank, plaintiff below, was carrying a deposit for the Petroleum Company, doing business at Lexington. One Fulton was Treasurer of the depositor, and was the clerk in general charge of its business office, books and records. It eventually developed that, over a considerable period, Fulton had been obtaining money from the bank upon his company's checks, by means of forging endorsements or raising checks, or both. During this period, the bank had been carrying the indemnity policy of the appellee, defendant below, which had been issued and continued in consideration of an annual premium, and by which the surety company agreed to indemnify the bank and hold it harmless "from and against any loss sustained by the insured * * * that is to say * * * D. Any loss through the payment, whether received over the counter or through the clearing house or by mail, of forged or raised checks or (genuine) checks bearing forged endorsements." From time to time the bank charged to the

depositor's account all these payments, as made. Running over the period from May 12, 1924, to August 1st, 1925, the bank paid and charged to the depositor 39 such invalid checks, in the total amount of $5,551.00. At the end of each month, the bank rendered to the depositor the customary monthly statement, in which each of these checks was shown as charged against the account, and returned to the depositor, as a voucher, each of the invalid checks. These statements and cancelled checks were delivered to Fulton in the regular course of business, and never came to the notice or knowledge of the depositor in any other way. In August, 1925, Fulton disappeared, and, upon hasty search then made by the bank, some of these checks were discovered, and a complete investigation was undertaken. [fol. 95] During September this was in progress and the surety company was advised. September 25, the depositor made formal demand upon the bank to cancel these 39 charges against its account and recredit it with the total sum which had been improperly charged. This demand was transmitted to the surety company, with the statement that the bank felt compelled to comply therewith, and with a request for indemnity. In reply, the surety company insisted that it was the duty of the bank to decline to make such recredit, and also to take steps against the responsible endorsers upon many of the checks. Nevertheless, the bank, after consideration, did recredit this sum, and then brought this suit against the surety company to recover the amount of the several checks, as being losses suffered under the policy. The parties, by written stipulation, waived a jury and filed an agreed statement of facts. This was treated as presenting one—and only one—issue of law—whether judgment should be for plaintiff or for defendant. The trial judge thought the plaintiff could not recover, filed an opinion giving his reasons therefor, and entered judgment accordingly.

The defenses were two: First, that the loss was suffered when the recredit was made, and that this act was voluntarily done by the bank—in the sense that the bank was not legally obligated to make this recredit, and could have successfully defended any proceeding alleging such liability. Second, that the bank had failed in its duty in taking the necessary steps to charge the endorsers before Fulton, and had thereby pro tanto discharged the surety.

The District Court sustained the first defense and did not pass upon the second.

Appellant urges upon us that the case is controlled by our decision in Ocean Co. v. Old National Bank, 4 Fed. Rep. (2d) 753, and deduces from that opinion the proposition that upon such a policy the insured may recover, even though its assumption and payment of the loss had been voluntary. That opinion should not be so interpreted, in the broad sense necessary to reach this case. There, the payment had been voluntary only in the sense that it had not been compelled by judgment; the liability of the bank to its customer was held to have been clear and certain; the Surety Company's position was that the bank [fol. 96] should have compelled an action to be brought against it and given the Surety Company an opportunity to defend, if defense there might have been; our holding was only that such a clearly apparent liability might be voluntarily recognized and paid by the bank without thereby discharging the surety. In the present case, the defendant's claim is that the bank was under no legal duty to make this recredit (which is said to be the loss involved) and so that the loss was suffered voluntarily, in the complete sense of that word. We think it plain that the consideration of that question here is not substantially affected by our decision in the Ocean case.

The primary question is, when was the loss suffered? We conclude that the moment the bank paid the check over the counter or through the clearing house, its loss was complete. The relation between banker and depositor is that of debtor and creditor; the money with which the check is paid is the money of the bank; its contract with the depositor only entitles it to charge back to, and collect from, the depositor the amount of a valid check so paid. When it pays a forged check, it has no right to make this counter charge, and its loss continues to be its loss. True, the continuance is attended by a contingency—the depositor may ratify the forgery. Such a ratification may be intentional and express, or may be implied as the result of circumstances which estop the depositor from disputing the check. So, in the present case, the loss was suffered and the liability arose from time to time as the checks were paid; and, when finally the bank cancelled the charges and recredited the total, it was not then suffering a loss; it was

abandoning a claim for recoupment of its earlier loss—a claim which at first it did not have. We think, therefore, that the policy should be read as indemnity against the original loss, and not as holding the liability in the air until it can finally be determined whether the bank had a right to make the charge back. It is not reasonable to suppose that the bank intended to buy that kind of indemnity. Banks wish to keep their depositors, not to alienate them. They would desire protection against the payments induced by forgery, not against the uncollectability of claims resulting from such payment.

[fol. 97] The question just discussed seems to be one of first impression; we are not cited to any particularly helpful precedents. Deciding this question as we do, the appellee's argument that the policy does not insure against liability, but only against loss, become immaterial. For example, in American Co. v. Bollman, 104 Fed. 634, there was a bond to secure the performance of a contract and then a bond to the surety to secure it against loss. The loss matured and was suffered only when the amount was fixed by the suit on the first bond. In Thatcher v. Ætna, 287 Fed. 484, the bond indemnified against damages from a tort. It was quite appropriate to think that the parties contemplated protection against damages to be fixed by suit.

The present record does not call upon us to decide what the rights of the parties would be in a case where the forgery had been expressly ratified before claim was made under the policy. Here the loss has been, as between the bank and the depositor, assumed by or clearly fixed upon the bank. We hold now only that the bank is not obliged to contest with the depositor any plausible claim by the latter that it has not become liable for the loss; and that, if there is any reasonable ground of litigation, the bank is not obliged to carry the burden of the resulting controversy. We find here that to the claim of the bank that the depositor was bound because of its failure to object to the monthly statements and returned checks, the depositor answers that it never had any notice of these checks excepting the notice thus given to its agent, Fulton; and, that this was not notice to it, as principal, because the agent had a hostile personal interest in the subject matter. These respective claims present a controversy, held no doubt on each side in good faith, and capable of leading to tedious and expensive, if

not doubtful litigation. It might turn out that such a case would be ruled by Leather, etc., Bank v. Morgan, 117 U. S. 96; conceivably, many facts which now appear or which might develop would distinguish therefrom. It would be most unfortunate for such an issue to be tried in a case to which the depositor was not a party, and where it would not be bound. Whether the Surety Company could have brought in the depositor as a party, or could now recover against it, we need not consider.

[fol. 98] Many—perhaps all—of these checks had been cashed for Fulton by others, and when they were paid by the bank bore endorsements by responsible persons. These endorsers then and there became liable to the bank, if the necessary notice was given. It gave no notice at that time, not knowing of the forgery. After being fully informed, it still gave no notice; but on October 2 reported to the Surety Company that the depositor demanded this recredit and gave the Surety Company full particulars. On November 25, the Surety Company notified the bank that the latter should have given notice at once to all endorsers and should now do so; it again so insisted on February 4; but the bank made no effort to comply.

There is no doubt that prompt notice was necessary in order to shift the loss from the paying bank to the endorser; but that right to shift is one given by the law and is contingent on conditions—one of which is prompt notice. The shift herein involved is given by contract and is unconditional. We have construed this contract—this insurance policy—as intended to transfer the whole loss immediately when suffered and not merely to indemnify against such part of the loss as might not be recoverable in some other way. Under such a construction, the failure of the bank to try to charge endorsers is a defense of the same character as its failure to resist the depositor's demand for recredit. We hold that neither defense is good.

If the Surety Company could get the benefit of any rights the bank had to recover its loss, or part of it, from others, it would be by paying the loss and acquiring these rights through subrogation. (Travellers Co. v. Great Lakes Co. —C. C. A. 6—184 Fed. 426, 430; U. S. Fidelity Co. v. Union Bank—C. C. A. 6—228 Fed. 448, 452). The Surety Co. was doubtless entitled itself to give the necessary notices. Its

request to the bank to do so was not in connection with any offer to pay up its liability, so that it might be entitled to have them given for it; the request was in connection with a denial of all liability.

The judgment must be reversed, and the case remanded for the entry of judgment for plaintiff in accordance with this opinion.

[fols. 99-110] Petition for rehearing, covering 11 pages, filed December 12, 1930, omitted from this print. It was denied and nothing more by order of June 30, 1931.

[fol. 111] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—Filed June 30, 1931

For the reasons stated in the memorandum filed, the petition for rehearing is denied.

(No memorandum attached to order.)

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 112] Supreme Court of the United States

Order Allowing Certiorari—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,227. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 413. The Ætna Casualty and Surety Company petitioner, vs. Phœnix National Bank and Trust Company of Lexington. Petition for a writ of certiorari and exhibit thereto. Filed September 25, 1931. File No. 36,227.